

EXHIBIT I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, on its
own behalf and on behalf of
EZEKIEL ELLIOTT

VS.

DOCKET NO. 4:17-cv-00615

NATIONAL FOOTBALL LEAGUE and
NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL

MOTIONS HEARING
BEFORE THE HONORABLE AMOS L. MAZZANT, III
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY,
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PROCEEDINGS

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

Okay, we're here on Case 4:17-cv-615,
National Football League Players Association, on its own
behalf and on behalf of Ezekiel Elliott, Petitioner,
versus National Football League and National Football
League Management Council, Respondents.

For the Petitioner?

MR. MELSHEIMER: Good afternoon, Your
Honor. May it please the Court, I'd like to introduce
my partner, Jeff Kessler, who will be handling the
argument for the Petitioner, as well as Ms. Angela
Smedley, here at counsel table, as well as John Amoona,
both with the Winston Strawn law firm; and Mr. Ezekiel
Elliott, as well.

THE COURT: Okay. Very good.

For the Respondents?

MR. KESSLER: Good afternoon.

MR. GAMBRELL: Your Honor, if it please
the Court, Eric Gambrell with Akin Gump, and here with
me today are my partners Dan Nash, who will be handling
the argument today, along with Nathan Oleson and Pat
O'Brien of my law firm, along with Adolpho Birch of the
NFL.

1 Thank you, Your Honor.

2 THE COURT: Very good. Thank y'all.

3 And I guess the first matter I wanted to
4 address is, I know that, I guess this morning or last --
5 after I went to bed last night, at some point the NFL
6 filed a Motion to Dismiss.

7 Of course, that motion is not a ripe
8 motion before the Court, because Petitioners have two
9 weeks to go ahead and file a response to that.

10 However, the Court still has to take up
11 the issue, we're here on a hearing on the request for
12 TRO or preliminary injunction; but as part of that, the
13 Court still has to address whether it has jurisdiction
14 over the matter.

15 So I'm not taking up the issue of the
16 Motion to Dismiss, but we still have to address the
17 issue of jurisdiction. So I would like to start with
18 that first.

19 And, also, if someone could answer the
20 question, because I've been in trial today, has a
21 decision come down from Mr. Henderson?

22 MR. KESSLER: Not yet, Your Honor.

23 THE COURT: Okay. So based upon -- does
24 that mean, since a decision has not come down,
25 Mr. Elliott can play this week without -- without the

1 Court from the NFL. Is that correct?

2 UNIDENTIFIED PERSON: Your Honor --

3 THE COURT: Well, you don't have a mic,
4 sir. That's one thing, the acoustics in the courtroom
5 have a lot to be desired, so everyone has to have a mic
6 when they are speaking.

7 MR. NASH: I can speak to that, Your
8 Honor.

9 Yes, I believe that is the case.

10 THE COURT: Okay. And so what is the
11 next, like, timeline, assuming Mr. Henderson doesn't
12 issue a decision? Is that next Tuesday as well, at some
13 point?

14 MR. NASH: I -- I believe that he will be
15 eligible to practice this week and play in this
16 weekend's game.

17 Depending upon the timing of Arbitrator
18 Henderson's decision, if it comes out before next week
19 and if it denies the appeal, my understanding is that
20 the suspension would go into effect next week.

21 THE COURT: Okay. So no matter what --

22 MR. NASH: That's not an issue.

23 THE COURT: Right, I understand.

24 So if he issues any affirmance of the
25 decision by the Commissioner, anything short of tossing

1 it out, for whatever reason, even if he reduces it one
2 game, that wouldn't impact this week now; it would only
3 impact starting after this game is over?

4 MR. NASH: That's correct, Your Honor.

5 THE COURT: Okay. So, the first thing I
6 would like to address is the issue of having
7 jurisdiction over the Motion for -- for the TRO, or the
8 preliminary injunction.

9 MR. KESSLER: Good afternoon, Your Honor.
10 My name is Jeffrey Kessler, as Mr. Melsheimer indicated,
11 and I'm going to speak on behalf of the NFLPA and
12 Mr. Elliott today.

13 I will turn to the jurisdiction ripeness
14 standing issues first, since Your Honor would like to
15 address them.

16 THE COURT: Well, I'm only doing that
17 because the Court can't proceed to take up the question
18 of injunctive relief unless I have jurisdiction, so it
19 is something I will have to deal with, if we get that
20 far.

21 MR. KESSLER: Completely understood, Your
22 Honor.

23 And while we had to scramble, as you can
24 imagine, since we received these arguments last night,
25 we filed today at about noon a reply paper which covers

1 each of these points, but I will cover them now as well.

2 So, first, Your Honor, the principal
3 argument the NFL made for lack of jurisdiction was based
4 on an entirely false premise, and frankly, Your Honor,
5 one which they should know better about, based on the
6 history between these parties and prior positions.

7 They present an argument that there's no
8 jurisdiction under the Federal Arbitration Act until
9 after a decision is rendered, and they even go so far as
10 to say, and venue has to be the place of the decision.

11 Now, that's a very interesting argument
12 except we are not premising jurisdiction in this case
13 under the Federal Arbitration Act, and the NFL knows
14 that. How do I know this?

15 Because we have been parties in numerous
16 cases together where we both have consistently taken the
17 position that jurisdiction in this type of a proceeding
18 is based on the Labor Management Relations Act, for
19 which there is clearly jurisdiction the moment that a
20 breach of the Collective Bargaining Agreement took
21 place, which has already taken place in this hearing,
22 and that there is no issue of jurisdiction at all.

23 Moreover, the Labor Management Relations
24 Act provides for venue in any District Court in the
25 United States. So it's not limited to the arbitration

1 at all.

2 The FAA is relevant on deciding issues of
3 vacatur. There's a lot of cases, including in this
4 Circuit, that when you are deciding, when you get to the
5 issue of fundamental fairness, for example, to look to
6 case law interpreting the FAA, even in a labor
7 arbitration. But with respect to jurisdiction, the FAA
8 jurisdictional limitations have nothing to do with this.

9 So what is applicable?

10 When they finally get to the LMRA, even
11 they do not argue there's no jurisdiction; instead, they
12 make two other arguments.

13 Argument number one is that you must
14 exhaust your remedies under the LMRA before you go to
15 court; which is not a jurisdictional argument, it's an
16 argument that we haven't exhausted our remedies.

17 The problem with that argument, as we've
18 set forth in our brief with case law citation, is that
19 what exhaustion requires is that you invoke the arbitral
20 process, which we did; that you go through the
21 arbitration hearing, which we did; that to present the
22 issues to the Arbitrator, which we did; and that the
23 Arbitrator rules on the issues, which he did, that are
24 relevant to our petition.

25 Because our arguments about being

1 deprived witnesses, about being deprived documents,
2 about the fundamental unfairness of the arbitration have
3 all been decided by the Arbitrator. The arbitral record
4 is closed, so there's nothing more to exhaust.

5 And that is all that the case law
6 requires.

7 Mr. Henderson is not reconsidering, or
8 given any indication he's reconsidering, his issues when
9 he decided that we're not going to get the accuser as a
10 witness; that we're not going to get the Commissioner as
11 a witness; that we're not going to get the documents we
12 requested. So all those issues are in the can and has
13 been exhausted.

14 If this were not the law, then you would
15 have a situation where you could use this issue of
16 exhaustion as a means of inflicting injury before you
17 even have a chance to get to judicial review.

18 Had Mr. Henderson's decision come out one
19 hour ago and had we not filed, then the player would
20 have been suspended for the entire week before we could
21 get into court to seek redress. So there's no way that
22 exhaustion of remedies in this case works here.

23 That's a case where they cited, for
24 example, the *Pennel* case, when the Union asserted
25 exhaustion of remedies.

1 In that case, a player sought to enjoin
2 the arbitration hearing from even taking place. So, of
3 course, that's a failure to exhaust. Akin to that, none
4 of the arguments had been presented to the Arbitrator.
5 In this case, everything was presented to the Arbitrator
6 and was exhausted.

7 The second argument they make is the
8 Norris-LaGuardia Act. This is another red herring.

9 They -- to read their brief, you would
10 think that the Norris-LaGuardia Act bars every
11 injunction involving an employer and an employee when
12 there's a Collective Bargaining Agreement in place.
13 That is absolutely not what the Norris-LaGuardia Act
14 does.

15 As we set forth in our brief, the
16 Norris-LaGuardia Act bars injunctions in cases like a
17 strike or a lockout or something done in the broad
18 collective bargaining process.

19 It actually was developed, in its
20 legislative history, as protection for unions, because
21 employers were filing antitrust cases to enjoin Union
22 strikes. That's the policies of that.

23 Otherwise, under Section 101 of the
24 Norris-LaGuardia Act, you are completely authorized to
25 grant injunctions in the labor context as long as you

1 meet the normal standards for a preliminary injunction.
2 You have to find likely success on the merits; you have
3 to find irreparable harm; you balance the hardships.

4 The best decision on this that I would
5 commend to Your Honor is the *Starcaps* decision, which we
6 cite in our brief, where the NFL made an identical
7 argument. That was a drug suspension policy case with
8 several players.

9 And the Court went through and basically
10 said, as long as we find the factors that warrant
11 preliminary injunctive relief and this is enjoining the
12 infliction of a suspension on specific employees, not
13 some big NFL policy, not some collective bargaining
14 agreement, the Norris-LaGuardia Act is not a bar at all.

15 And this is not just one case that's held
16 this. We've gone through this, Your Honor, so we've
17 cited *Starcaps*, we cited *Mackey*, we cited *McNeil*, we
18 cited *Jackson*. Everyone of these cases, as well as
19 others, have come up in the context of sustaining
20 injunctive relief, sustaining injunctive relief against
21 the NFL.

22 These are all NFL cases in the context of
23 players being suspended in particular cases, or getting
24 an injunction imposed for antitrust relief on a
25 preliminary-injunctive basis.

1 So the Norris-LaGuardia Act is not a bar
2 here.

3 What's left?

4 They argue that it's not ripe. Well,
5 interestingly, ripeness is a doctrine that you look at
6 not just at the time of the complaint, but you look at
7 ripeness on events subsequent to the complaint.

8 Now, first of all, we had a ripe dispute
9 because the violation of the CBA, the deprivation of the
10 fair hearing has already taken place, and the player has
11 already had that dispute over this arbitration. That
12 exists right now. But, secondarily -- so, it's ripe
13 from day one.

14 Secondarily, since Mr. Henderson has
15 indicated in an e-mail he sent to counsel today on both
16 sides, that his goal was to issue a decision by close of
17 business today, but that he said it could go a little
18 bit longer because of the volume of materials.

19 Well, even if he issues it tonight or
20 tomorrow or the next day, all of that goes to your
21 ripeness determination at the time you decide this
22 motion. That's what the case law says. That's what we
23 cited.

24 So there's going to be no question that
25 this is going to be ripe under any set of standing.

1 Finally --

2 THE COURT: So are you -- are you saying
3 that it's not ripe until he actually,
4 "Henderson," issues a decision?

5 MR. KESSLER: No, Your Honor. I say it's
6 ripe right now, because he already violated the CBA by
7 not providing a fundamentally fair hearing under the
8 LMRA and the player has already suffered that breach, as
9 has the Union.

10 But if you were to accept the NFL's
11 argument that it should not be ripe until the decision
12 is entered -- so assuming, arguendo, you accepted that,
13 the cases say you decide ripeness not at the time of
14 filing of the lawsuit, but at the time at which you
15 would look at the issue of ripeness on this motion.

16 And what I'm saying is, by the time you
17 would have to enter a motion (sic) now, especially since
18 the NFL said that Mr. Elliott is playing this week no
19 matter what; you know, next week is an issue, now that
20 they've gone on the record on making that concession --
21 when you issue your decision, which I would suggest
22 should be shortly after Mr. Henderson rules in the next
23 day or two -- because now, there isn't the urgent need;
24 and it could be tonight, but we'll see when he enters it
25 -- at that point, it will unquestionably be ripe.

1 Because you, even under their view, would have a
2 completed dispute then under the most extreme view they
3 take. And the case law says you look at ripeness at the
4 time that the decision's made.

5 All these cases also talk about the fact
6 that when you consider things like ripeness, when you
7 consider things like exhaust your remedies, you're
8 supposed to balance the potential injustice of the Court
9 not acting versus the practical consideration as to
10 whether there's a concrete controversy. And we believe
11 on that record, it will be clear that this is ripe.

12 The final argument they make, because
13 they make six different arguments about this point, is
14 they also say we have no standing under Article 3.

15 well, the case law we cited makes it very
16 clear that injury, in fact, can be incurred or imminent.
17 It can be imminent. Now, why -- we cite a Supreme Court
18 authority on that in our brief. Why is that intuitive?

19 well, Your Honor knows that virtually
20 every preliminary injunction case where a case starts
21 that way, the litigant is seeking to enjoin a threatened
22 injury. When the bulldozer is about to invade your
23 property and knock down your house without authority,
24 you don't have to wait for your house to fall down to
25 say you have Article 3 standing.

1 The imminent injury of that bulldozer
2 plowing forward towards your house gives you standing to
3 seek an injunction against the threatened harm. It
4 gives you standing to go to court. Otherwise, none of
5 this would work.

6 In fact, there are -- there are many
7 cases where litigants in arbitrations go to court
8 because the employer is seeking to impose discipline
9 before the arbitration even takes place, to try to
10 circumvent the arbitration process. And the courts
11 always find they have standing there.

12 So none of these doctrines save the NFL.

13 And, you know, it's quite interesting,
14 because they accuse us of gamesmanship, when what this
15 really is is the NFL's desire to sneak their -- their
16 suspension in and evade judicial review, or to pick the
17 forum of their choice and then argue that, okay, says,
18 you have to go because we beat you to the courthouse.

19 What we did here was properly assert a
20 claim for a breach under the LMRA that was concrete at
21 the time, it was ripe, the Court has jurisdiction, we
22 had exhausted all the remedies, we had standing, and
23 there was nothing left to do.

24 So unless Your Honor has further
25 questions about this set of issues, I would propose to

1 move on to the injunction; but however you'd like to
2 proceed.

3 THE COURT: Well, let's -- before we go
4 on to the injunction, I'm going to give the NFL a chance
5 to respond.

6 But I do have a question in dealing
7 with -- in looking at some Labor Management Relation Act
8 cases, now, they are in the employee context, there's
9 case law out there that indicates that you have to
10 exercise the administrative process or grievance system,
11 and then there is a body of case law says that we
12 have -- in those cases, you have to wait till the award
13 or decision on the grievance process.

14 How -- I know that's not in the same
15 context that we have here, but that is a body of law in
16 the employee context.

17 How do you factor in what you've done if
18 I look at that body of case law in relation to this
19 case?

20 MR. KESSLER: So that body of case law
21 involves situations where the litigant did not present
22 the issue to the Arbitrator at all. In other words, it
23 was a litigant who was trying to go to court directly,
24 when there is a requirement to arbitrate, and didn't
25 present the issue to the Arbitrator.

1 This is the exact opposite situation. In
2 this case, we filed our arbitration. We appeared before
3 the Arbitrator. We presented these issues to the
4 Arbitrator. The Arbitrator ruled against us on each of
5 the issues. So on each of the issues of fundamental
6 fairness that we are complaining about, the record is
7 closed. The Arbitrator has ruled. There's nothing left
8 for us to do or exhaust.

9 There's not a single case that has ever
10 indicated that exhaustion, that you have to do something
11 more than go to the Arbitrator, present the issues, let
12 him decide.

13 If Mr. Henderson did not get to decide
14 whether to order the accuser to testify, if Mr.
15 Henderson did not get to decide whether Commissioner
16 Goodell was to testify, if Mr. Henderson did not get to
17 decide the various document issues where we've been
18 deprived, then we would not have an exhaustion. Because
19 the idea is to give the Arbitrator time on those issues,
20 to see if that gives you a remedy.

21 Well, we've already exhausted that
22 remedy. And what we're here to complain about is
23 exactly the adverse decisions of the Arbitrator.

24 This proceeding, to be clear, is an
25 attack on the fundamental fairness of the Arbitrator's

1 conduct in these proceedings. So this can't be a
2 failure to exhaust before the Arbitrator is done.

3 So some cases, for example, someone goes
4 into court first and says, "Okay, we think this
5 Arbitrator is going to be biased, he should be recused,
6 step aside," but they don't go to the Arbitrator. So
7 the courts say you have to first go to the Arbitrator
8 and argue that to the Arbitrator and then the Arbitrator
9 has it. That's exhausting your remedies.

10 The Arbitrator then could decide, "Okay,
11 I'm going to recuse myself," and he'll step aside for
12 conflict. If he doesn't, then you have exhausted your
13 remedy.

14 So, again, I think when you look at every
15 one of the cases on exhaustion, you will find those are
16 cases where the issue wasn't presented to the Arbitrator
17 or the Arbitrator had not yet had an opportunity to
18 provide a remedy.

19 Here, we are going solely and completely
20 on issues the Arbitrator's already decided and which the
21 record is closed on and it's finished.

22 THE COURT: Okay. Thank you, Mr.
23 Kessler. I will call you back in a few minutes after we
24 hear their response.

25 Mr. Nash, you want to give the response

1 on issue of jurisdiction for the TRO and preliminary
2 injunction.

3 MR. NASH: Thank you, Your Honor. May it
4 please the Court.

5 I'm going to start with what counsel just
6 said are the sole issues in their injunction request,
7 and I believe he -- he identified the procedural
8 decisions that the Arbitrator made during last week's
9 proceeding. And one of them you should know, I think we
10 point out in our papers, was in a written decision
11 before the hearing on a Motion to Compel witnesses.

12 And so as I understand what he just said,
13 they can come into court now and seek interlocutory
14 review of the Arbitrator's procedural rulings before
15 there is a final award.

16 I think saying that, Your Honor, makes it
17 absolutely clear how improper and inappropriate not only
18 the Petition here is, but the -- but the TRO motion.

19 What -- what he just said, I would submit
20 respectfully, is akin to Your Honor conducting a trial;
21 during the trial, making various evidentiary rulings
22 about documents and evidence and witnesses; and -- and
23 the case comes to a close; and at the end of the case,
24 counsel makes the closing argument -- and which is what
25 we did, which we had last week -- and the case is

1 submitted, whether it's to a jury or whether it's to a
2 Judge, and before that decision is rendered, they can
3 run to the Court of Appeals and say, "We've done
4 everything, those rulings have harmed us, and we now
5 have a ripe dispute to -- that the Court of Appeals can
6 weigh in on."

7 I think saying it proves the point.
8 Quite obviously, that's not something that is
9 permissible.

10 And the main reason --

11 THE COURT: Those aren't really
12 comparable examples; because there's a whole bevy of
13 relief where things can happen in a civil context in a
14 case, if a case is submitted to the jury versus -- and
15 other relief.

16 Here, they're asserting that if a
17 decision is issued -- now, of course, we're past the
18 window for this week; but if a decision is issued, even
19 if he's immediately suspended, or if that's affirmed,
20 any part, he's going to be band from practice and such.

21 So it's not the same situation about
22 trying to -- I just don't think it's the same. I
23 understand the example, but I just don't think it's
24 equivalent to what we have here.

25 MR. NASH: Well, I would -- I would -- I

1 would suggest, Your Honor, that it is the same in the
2 sense that one of the reasons, whether it's in court or
3 in arbitration, you don't even get to interlocutory
4 review of those kinds of rulings, is that they could get
5 all of the relief that they ask for.

6 He's right, we don't -- we don't have a
7 decision. It is quite true that the Arbitrator could
8 uphold the suspension. But just last week, counsel
9 asked him to, based on the very same arguments that they
10 have made in their petition, to either reduce or vacate
11 the suspension. And that's critical, I think, for the
12 standing and jurisdictional question.

13 Now, let -- let me go back to what he
14 said at the beginning, because I do think it's important
15 for -- for Your Honor, in terms of resolving this
16 jurisdictional question, as a threshold matter.

17 At the end, he said they filed an action
18 under the FAA; but at the beginning, he said, our
19 principal argument with respect to jurisdiction was
20 based on the FAA, and I think he was somewhat critical
21 of our papers.

22 Let me be clear, our papers addressed
23 what they said in their Petition. In the very first
24 page of their Petition, they -- they -- they were
25 seeking to vacate a future arbitration award under both

1 the FAA and the LMRA. And the last page of their
2 Petition, their only prayer for relief is to -- is for
3 the Court to vacate the future arbitration award
4 under -- under the FAA and the LMRA.

5 So, of course, in filing our papers, we
6 address both of those statutes, and I think we
7 demonstrated -- and I don't know if Your Honor has had
8 an opportunity to read them -- but I think we
9 demonstrated --

10 THE COURT: I have.

11 MR. NASH: That under either, under
12 either, I think the law is clear that there's no
13 jurisdiction, there's no standing, there's no ripe
14 controversy for a litigant to come in and seek judicial
15 review of an arbitration proceeding before the award is
16 issued.

17 THE COURT: So what happens if he issues
18 the award tomorrow? So then this case is ripe, under
19 your view?

20 MR. NASH: If -- if -- if -- if --

21 THE COURT: If Henderson issues a
22 decision tomorrow -- apparently the parties thought he
23 was going to -- y'all thought he was going to issue it
24 today; he didn't. So if he issues it tomorrow, isn't
25 the dispute then ripe --

1 MR. NASH: I think --

2 THE COURT: -- for the Court, before this
3 Court?

4 MR. NASH: Well, I -- I -- I think we're
5 talking about different things, so maybe I should -- I
6 should break it down. Let me first talk about
7 jurisdiction, because I think that that's the most
8 important point to make.

9 And I am going to take counsel's point
10 that this case is governed by the LMRA. I completely
11 agree. He cited the position we've taken in other
12 cases. I completely agree, this case is absolutely
13 governed by the LMRA, including the exceedingly narrow
14 standard of review that we'll get to when we get to --
15 if we get to the merits of their -- their TRO request.
16 But under the LMRA, he said it's not jurisdictional.

17 Well, I think, Your Honor, on Page 7 of
18 our brief, we cite the Circuit cases that say that it
19 is.

20 So I don't agree. I think it is
21 completely jurisdictional. I think the law -- and this
22 is an area of law -- and let me -- let me just say this
23 about this argument, as well as a number of the other
24 points that I think we try to make in our briefs and we
25 may be interested in today.

1 I don't know that there is an area of
2 law, Your Honor, that is more well-settled, that has
3 more Supreme Court decisions on -- on the review of
4 arbitration awards, on the propriety of doing what
5 they're trying to do here.

6 It's been answered by the Supreme Court;
7 it's been answered by the Fifth Circuit; and as we point
8 out in our -- in our briefs, it's been answered in every
9 case that where -- where the Players Association or a
10 player has tried to challenge a suspension or challenge
11 the collectively-bargained disciplinary appeals process
12 in imposing a suspension. And every single time, every
13 single time, it's been rejected.

14 But as far as the jurisdictional
15 question, I think the law is quite clear that it is
16 jurisdictional.

17 Now, as far as this argument goes, well,
18 all you have to do is -- he distinguishes the *Pennel*
19 case. And I would commend Your Honor to -- we cite the
20 position that the Players Association took in the *Pennel*
21 case this last year, and it's not quite, I think, how he
22 described it.

23 He said, well, you have -- the cases that
24 we're relying on are just situations where the employee
25 didn't pursue or the Union didn't pursue arbitration at

1 all. That's not -- that's just simply not the case.

2 And, in fact, what they said on Page 5 of
3 their submission, and it's cited at Page 8 of our brief,
4 what they said last year to a different Judge, Your
5 Honor, is that Plaintiff has failed to exhaust his
6 administrative remedies, further compelling dismissal.
7 Dismissal, jurisdictional. You can't come into court
8 and sue under the LMRA if you haven't exhausted your
9 administrative remedies.

10 And that means you have to not just
11 pursue arbitration, you have -- you can't start an
12 arbitration and then say, "You know, I'm not happy with
13 the way it's going. I might win, but I might not win.
14 I'm going to run to court." That's not exhaustion under
15 any -- under any of the cases.

16 And, in fact, Your Honor, they don't cite
17 a single case that supports that argument, not -- not a
18 single case. They cite one case, I think the *Frost*
19 case. But in that case, the case had gone through to an
20 award, and -- and there was no claim that the employee
21 hadn't exhausted his remedies.

22 They don't have a single case -- and you
23 can go from the Supreme Court on down, Your Honor, I
24 mean, this is just a bedrock principle of labor law, and
25 that's why they told the Judge in Ohio last year that --

1 you know, a very different story.

2 And, in fact, what they said is, as to
3 the point that you just made about, well, what happens
4 if the Arbitrator rules tomorrow, but they said, the
5 player -- the player is not suspended now -- I'm quoting
6 them at Page 7 of their brief, "Player is not suspended
7 now and will not be suspended until and unless the
8 Arbitrator hears the appeal and issues an award
9 affirming the discipline. As such, Plaintiff's claim of
10 irreparable harm is not ripe and may never be."

11 That's what they said last year, Your
12 Honor, on ripeness.

13 So --

14 THE COURT: Remind me in the *Pennel* case.
15 Was it dealing with the same situation of assertion of
16 unfairness in the procedure?

17 MR. NASH: It was -- it was -- I would
18 argue it was very similar. It was a player who
19 individually was dissatisfied with -- with -- with his
20 case. He went to court before the -- before the
21 arbitration.

22 He actually sued both the -- the League
23 and the Players Association, which is why they had to
24 take a different position than they're -- they're taking
25 now.

1 But he was making the very same kinds of
2 preemptory challenges under -- under Section 301 of the
3 Labor Management Relations Act before an award is
4 issued.

5 So, I -- I -- Your Honor, I just don't
6 think it could be clearer -- and I actually have copies
7 for the Court's convenience of their written submission,
8 if you would like to look at it, because it is -- it is
9 quite remarkable, it's quite remarkable the extent to
10 which they made, last year, the arguments that they're
11 making this year.

12 What an interference with the public --
13 they actually said the relief there would undermine
14 public policy concerning judicial deference to labor
15 relations, as well as to enforcing arbitration
16 agreements according to their terms.

17 So, the contrast, Your Honor, could not
18 be more stark. And that's true for -- for the
19 jurisdictional question. It's true for the ripeness
20 question.

21 And I think when we talk about standing,
22 I don't know -- I know that courts normally want to get
23 to Constitutional questions last. I think if there's
24 another basis to rule, there's not a need, I think, to
25 get to the Constitutional question. But there is no

1 case or controversy here.

2 This -- this -- this example that he
3 talked about of imminent harm is completely undermined,
4 it's undermined by the -- the obvious fact, the obvious
5 fact that they could win.

6 So when they say things like they said
7 today in their reply brief, that there's nothing that
8 the Arbitrator can do to remedy their fairness arguments
9 that they're asserting in support of this lawsuit and
10 injunction request, this is -- this is not correct.
11 They could win.

12 And, again, I think it's --

13 THE COURT: Nobody can fix the procedure
14 errors that they're asserting. I mean, they're
15 asserting that because the procedures to be
16 fundamentally unfair, the Arbiter can't fix those.

17 MR. NASH: Well --

18 THE COURT: Those -- those have already
19 happened.

20 MR. NASH: They -- well -- but they're
21 claiming that because of the procedural errors, it has
22 prevented Mr. Elliott from having a fair hearing to
23 overturn his discipline.

24 If the Arbitrator, for whatever reason --
25 and I think this is sort of, again, another bedrock

1 principle, judicial principle; it's not arbitral -- it's
2 certainly not arbitral -- if the Arbitrator can give
3 them all the relief that they are requesting, then I
4 would -- I would -- I would submit that there is no
5 harm, there is no imminent harm, there's no harm at all,
6 and there is no case or controversy.

7 It's not -- this is a -- this is an
8 important principle that courts guard against, I think,
9 Your Honor, and I think it's -- it's quite important
10 here.

11 And as far as getting a remedy, and I'm
12 going to -- I'm spilling over a little bit into the --
13 sort of the merits of their claim; but remember,
14 their -- the other thing that I think we all have to
15 keep in mind in this case, because there's a lot of
16 allegations getting thrown around, but this is an action
17 that has one prayer for relief.

18 The only prayer for relief, it's not to
19 fix the procedural rulings, it's not to stop the
20 Arbitrator or force the Arbitrator to change what he
21 did. So, it's not -- it's not a question of -- they're
22 not asking you to tell the Arbitrator to do something
23 different. They're seeking to vacate his award, that
24 hasn't even yet issued. And -- and the -- so again, I
25 think it makes obvious how -- there's simply no

1 jurisdiction and no controversy here for you at this
2 point.

3 And as far as whether he does it tomorrow
4 or he does it -- Your Honor, that's always the case.
5 This is -- that's a temporal issue. I mean, they're --
6 they're free to file a proper action. And -- and -- and
7 let's -- let's put into context here what they are
8 really saying.

9 So if -- if they can only -- if it takes
10 them another day or two to get to court and -- and --
11 and Mr. Elliott misses a practice or something, that's
12 imminent harm that warrants prematurely involving the
13 Federal Courts in what I would suggest is an
14 interlocutory, internal arbitration process?

15 That, again -- I think the other side to
16 this argument, that we haven't talked about, is how, if
17 you consider the merits of what they're claiming -- and,
18 again, it's -- it's -- these are arguments seeking to
19 vacate the ultimate award -- they are completely
20 foreclosed by the LMRA, and I can address those.

21 THE COURT: wouldn't you agree with me
22 that the procedural issues they're raising, that record
23 is complete. There is nothing else in terms of anything
24 developed, and really nothing that the Arbiter can
25 decide unless he throws the whole award out, I mean, if

1 he vacates it completely.

2 But no matter whether he reduces it or
3 affirms it, everything that the Court has to decide in
4 terms of what's being asserted in the Petition are the
5 defects or procedural errors, there's nothing else that
6 has to be decided to decide that issue.

7 That's all before the Court, is it not?

8 MR. NASH: I don't think it is, Your
9 Honor.

10 THE COURT: So what's not before the
11 Court on the issues they're raising?

12 MR. NASH: Well, I think you -- I think
13 you just had a little misdirection, to be honest with
14 you, Your Honor.

15 I think what they are throwing around in
16 this Petition is this idea that suspending Mr. Elliott
17 would -- would be unfair. Okay, they talk about
18 fairness.

19 And we spent three long days last week,
20 all of us in New York, before the Arbitrator
21 presenting --

22 THE COURT: I spent my weekend reading it
23 all, so...

24 MR. NASH: And -- and, Your Honor, they
25 submitted the issue. So -- so let's start -- I think

1 it's important to be specific about what they're
2 complaining about.

3 The first point that they're challenging
4 --

5 THE COURT: We don't have to talk about
6 the merits of those, but just in terms of --

7 MR. NASH: No, I think it related to your
8 question.

9 THE COURT: Go ahead.

10 MR. NASH: So -- so the principal, the
11 principal argument I think that they're making is, they
12 filed a Motion to Compel before the arbitration
13 proceeding and they argued that the -- that Ms. Thompson
14 should have been compelled to testify, okay. And we had
15 a hearing about that.

16 And -- and the Arbitrator issued a
17 written decision, making a number of points, and -- and
18 concluding that under this Collective Bargaining
19 Agreement, he was not persuaded that -- that that was
20 appropriate. That's one of their main arguments.

21 In closing, okay -- and really their
22 entire, their entire argument about the suspension from
23 the beginning, was -- was to challenge the credibility
24 of Ms. Thompson, okay.

25 And in closing, Counsel right here argued

1 you should -- it's not fair to -- to discipline if we
2 don't get to confront the accuser. So they have made
3 that argument. They have made that argument. And it is
4 something that is under advisement by the Arbiter. I
5 don't think it has any merit.

6 And if we get to the LMRA standards for
7 your review of the decision that the Arbitrator made on
8 the Motion to Compel, there's no basis. And the courts
9 have repeatedly said that -- from the Supreme Court,
10 again, on down, that procedural questions, like, what
11 witness gets to testify and what documents or discovery
12 is appropriate, those are for the -- for the Arbitrator
13 to make. And even if the -- even if the Court
14 disagrees, those cannot be second-guessed absent some
15 sort of misconduct. Okay?

16 So absent a situation -- the *Gulf Oil*
17 case that is really is only one of the cases they can
18 point to where the Arbitrator refused to hold a hearing.
19 Okay, I get that.

20 But there's no dispute here that
21 Mr. Elliott had the hearing. He got to present numerous
22 witnesses. He actually, through witnesses through
23 affidavits were accepted into evidence by the
24 Arbitrator, and he got to argue it wouldn't be fair
25 without the accuser appearing.

1 So I would submit, Your Honor, that no,
2 this is not the time. I think you have to -- at a
3 minimum, a court would have to have an award to look at
4 and understand what the basis of the Arbitrator's
5 ultimate decision is.

6 So I just don't -- I don't -- and that's
7 true for the other -- other arguments that they're --
8 that they're making here. And, in fact, one of the
9 arguments is -- is -- is just -- is really completely
10 the basis of their -- their appeal to reduce
11 Mr. Elliott's dismissal. We -- we don't know what the
12 Arbitrator is going to do.

13 I don't know -- I argued against. I
14 argued that it was just wrong. I don't think it was
15 either appropriate for Ms. Thompson to be -- first of
16 all, the NFL -- she is not employed by the NFL. The NFL
17 can't force her to testify. I don't think under the
18 Collective Bargaining Agreement that applies, and this
19 is well established that -- that she should be
20 compelled, particularly in a case like this --

21 THE COURT: Well, we will talk about that
22 in a minute.

23 MR. NASH: Yeah. But so --

24 THE COURT: Let me give them an
25 opportunity to speak first on the merits.

1 MR. NASH: Okay. Sure.

2 But unless you have any other
3 questions...

4 THE COURT: No, I don't have. Thank
5 you.

6 MR. NASH: Thank you.

7 THE COURT: And then, Mr. Kessler, do you
8 want to respond to all the jurisdictional arguments
9 before we --

10 MR. NASH: Only -- only to two.

11 THE COURT: Go ahead.

12 MR. KESSLER: So, Mr. Nash talks about
13 the *Pennel* case, that's the case last year in which the
14 NFLPA was a defendant, as well as the Management
15 Council, and said that shows how we should apply the
16 exhaustion of remedies.

17 well, it does, but not in a way that Mr.
18 Nash would like it.

19 So in that case, to be very specific,
20 there was an arbitration that should have gone forward
21 to review a drug suspension.

22 And the player argued there were only two
23 arbitrators available to select from, when the
24 Collective Bargaining Agreement, in his mind, said there
25 should be three.

1 And he went into court and said, "I don't
2 even want to go to this Arbitrator -- or have an
3 arbitration, because there should have been three, not
4 two."

5 In that context, yes, the Union's
6 position was, and would be today, that you have to first
7 go to the Arbitrator and say, "The Collective Bargaining
8 Agreement provides for three, there were only two," and
9 give the Arbitrator a chance to rule on that specific
10 procedural defect.

11 That is why there was no exhaustion in
12 that case.

13 This, again, is the opposite case. And
14 Your Honor said it very well, says the Arbitrator's
15 ruled already on these -- on these issues; twice he's
16 ruled on this.

17 And Mr. Nash is wrong. These issues are
18 not before the Arbitrator right now. What's before the
19 Arbitrator right now is his ultimate decision on the
20 merits of the arbitration. But he has rejected all of
21 the things we are complaining about, the fundamental
22 fairness, and it can't be fixed.

23 Your Honor is correct: You have
24 everything you need as a Court to decide that issue
25 right now.

1 The only last thing I'll say in response
2 to this is, Mr. Nash said, well, we didn't cite any
3 cases where there wasn't already an award issued.

4 In fact, that's wrong. Right on Page 2
5 of our brief, we cite a case where the Plaintiff tried
6 to do an arbitration and the arbitration never took
7 place, and the Court said he had exhausted simply by
8 trying to do the arbitration and had tried to invoke the
9 process, even though that process never went forward at
10 all.

11 And that is the case, I believe, of
12 *Del Costello versus International Board of -- of*
13 *Teamsters.*

14 And what the Court said there -- that's a
15 Supreme Court case; a pretty good case, says Plaintiff
16 must attempt to exhaust any grievance arbitrations
17 provided in a collective bargaining agreement before
18 seeking relief in Federal Court.

19 And actually that -- I can't tell from
20 the citation -- no, I think that is *Del Costello*. You
21 will forgive me, Your Honor. It also might be *Scott*
22 *versus Anchor Motor Freight*. Since we put together this
23 brief in literally two and a half hours, I'm not sure
24 which of the two cases. But the point is here, we have
25 given you citation that even when the process doesn't

1 happen, as long as the Plaintiff made the required steps
2 to exhaust, after that, the exhaustion issue is over.

3 So unless Your Honor has further
4 questions, I think I've covered this subject, and I will
5 move on to the TRO issues.

6 THE COURT: Yes. Because, I mean, I'll
7 have to decide that threshold issue, but we will go
8 ahead and proceed with the argument on the injunctive
9 relief.

10 And I believe that both sides were all in
11 agreement of what is before the Court and what is not,
12 in terms of what the Court has to decide, and it's not
13 the issue of credibility or what happened or not
14 happened, it's about the -- whether the proceeding was
15 fundamentally fair or not. That's the question before
16 the Court, if I reach that question. So...

17 MR. KESSLER: You have said it very well,
18 Your Honor. The issue here is whether or not the basic
19 standard, which every labor arbitration in this country
20 must go through of fundamental fairness has been applied
21 in this case.

22 And the importance here is that this
23 principle applies, it's well established in the Fifth
24 Circuit, no matter what the Collective Bargaining
25 Agreement says, they like to argue -- and I'm sure you

1 saw it in their brief, and you will hear it again --
2 well, we should have bargained for fundamental fairness
3 in the Collective Bargaining Agreement, and where is the
4 provision that says you're entitled to confront your
5 accuser in a case like this? They go, it's not in the
6 CBA, so therefore, we don't get it.

7 That's not the issue. We're not asking
8 you to second-guess the CBA. We're not asking you to go
9 into the findings of facts. The issue here is uniquely
10 for the Court. That's what the Fifth Circuit said in
11 *Gulf Coast Industries*; it's still the leading case on
12 this in the Fifth Circuit. Which is that there must be
13 a fundamentally fair process.

14 You know, because we're in a rule of law
15 where there -- where basically for Federal Courts to
16 allow arbitration to be the exclusive remedy. And as
17 Your Honor knows, the courts today give broad scope to
18 arbitrations. But underlying that is the fundamental
19 requirement that it must meet basic standards of
20 fairness.

21 So what's very significant here, Your
22 Honor, is that the issue must be looked at in the
23 context of the specific arbitration before you. In
24 other words, there is no abstract right. In other
25 words, I wouldn't say that in every possible case you're

1 entitled to every possible witness as an issue of
2 fundamental fairness. That's not the issue.

3 The issue is, in this particular case for
4 this particular policy in the context of the issues
5 here, what did fundamental fairness require. And that's
6 where I'm going to go to.

7 And, Your Honor, we're starting first
8 with the -- with the preliminary injunction standard of
9 likelihood of success on the merits.

10 I know Your Honor knows these standards
11 very well. You -- you articulated them exactly right
12 recently in the *Dickey's Barbecue Pit* case, so I am not
13 going to purport to tell you what the standards are.

14 And you know from your review of the case
15 law that likelihood of success doesn't mean that we have
16 to show we're entitled to summary judgment now. What we
17 have to show -- and this is what I'm going to get to --
18 that in order to preserve the status quo, which is all,
19 by the way, we're seeking to do: a status quo
20 injunction.

21 So, Mr. Elliott has been playing for the
22 cowboys for the last year, even though he's been under
23 investigation, even though this has all gone on, we're
24 simply seeking to maintain that status quo until Your
25 Honor can decide the ultimate question in the case,

1 which is whether or not this arbitration was
2 fundamentally unfair and therefore must be vacated.

3 And interesting, Mr. Nash said, well, the
4 only relief we're seeking is to vacate the arbitration.
5 well, let's be very clear. If you vacate the
6 arbitration, the suspension does not ever go into
7 effect. And so that it's not like vacating the
8 arbitration is some abstract proposition.

9 The way in which the CBA is set up is
10 so when the Commissioner imposes discipline, it has to
11 be subject to an appeal. And if the appeal was
12 improper, then there's no suspension in effect.

13 Now, I guess the Commissioner could try
14 to start over and do something again in the future; but
15 this suspension would never go forward if you vacate the
16 arbitration. That's why -- that's why this is so
17 important.

18 So our preliminary relief is simply to
19 give the Court the time to decide these complex,
20 important, difficult questions, which are worthy of
21 judicial review, to ensure fundamental fairness. And I
22 use those words because those are the words from the
23 Fifth Circuit case law that's in our brief.

24 So we don't have to show we're definitely
25 going to win or even that it's overwhelmingly likely

1 we're going to win, we just have to present substantial,
2 difficult, important questions for review, if we satisfy
3 the other elements of the preliminary injunction.

4 So let me talk now about likelihood of
5 success in this context, but with the view that all we
6 have to show are there substantial questions there.

7 First of all, I start with the denial of
8 the right to have Ms. Thompson come in and testify and
9 be subject to cross-examination.

10 As I said, that issue has to be decided
11 in the context of this specific case. So what does the
12 record show? And you have a complete arbitral record
13 before you. What does the record show in regard to
14 that?

15 First of all, we have a player who has
16 not been criminally charged, certainly not been
17 criminally prosecuted or convicted. And under the
18 Personal Conduct Policy that the NFL promulgated, they
19 put in a special requirement -- doesn't exist if you
20 have pled guilty or if you've been prosecuted and you've
21 done a plea agreement, it doesn't exist -- but when that
22 doesn't take place, they said there must be, quote,
23 credible evidence to support the charges.

24 And I would say, by the way, that it's a
25 very important requirement, because it's a recognition

1 that if the authorities didn't see a reason to go
2 forward with anything and you have no admission from the
3 player -- in fact, you have here the most strenuous
4 denials under oath -- there needs to be credible
5 evidence before you wreck this player's career, before
6 you wreck the team's competitive abilities, before you
7 intervene in this way.

8 So the Arbitrator's decision was: Did
9 the Commission of Discipline comply with the policy in a
10 fair and consistent way upon which the player and the
11 Union had the burden of proof. And that's very
12 significant now, Your Honor.

13 How are we going to be able to fairly
14 discharge our burden of proof to challenge the essential
15 issue of credible evidence if you can't present the
16 accuser in the hearing to be cross-examined, so that
17 just as the Arbitrator got to see Mr. Elliott testify
18 for hours and hours, he also will get the accuser to
19 testify and be able to do that.

20 Now, the NFL sort of makes two arguments
21 about this, or they made it to the Arbitrator. One,
22 they said, well, we don't control her. You know, she's
23 like an independent person.

24 well, the problem with that, Your Honor,
25 is that they didn't try, and no one asked them to try,

1 even though she voluntarily was interviewed by them six
2 times; she voluntarily gave them her cell phone to be
3 examined; she did everything they asked for this.

4 So we have every reason to believe that
5 had the Arbitrator said, "You have to ask this witness
6 to testify," that she would have said yes.

7 And I asked Ms. Friel, who's in charge of
8 this whole disciplinary process, whether or not she was
9 aware of any efforts made to even ask the accuser if she
10 would come in and do this. And, of course, the answer
11 on the record was no, there were no such efforts.

12 And the reason there were no such efforts
13 is very obvious. I asked Ms. Kia Roberts, who was a
14 very truthful witness in this proceeding, very truthful
15 witness, who is the Director of Investigations, whether
16 in her nine years as a prosecutor she had ever presented
17 a witness with so many credibility issues as
18 Ms. Thompson had, for being subject to cross-examination
19 in a case, did she ever choose to have such a witness,
20 in her entire career as a prosecutor of nine years, and
21 her answer was, "No." Okay? Her answer was, "No."

22 And that goes to why this witness, had
23 she been available, we are convinced would have been
24 essential to our ability to go to this issue of
25 credibility, which is at the essence of this

1 case-specific issue. There may be cases where the
2 League never interviews the witness and doesn't -- the
3 accuser, and doesn't rely on it.

4 Here, virtually the entire complaint, the
5 entire discipline is based on the allegations of
6 Ms. Thompson.

7 Now, it's interesting because the
8 Commission of Discipline letter says, "well, I knew she
9 had credibility issues, so I rely on other things."

10 But when you look at those other
11 things -- and we'll do this when we get to the Petition
12 to vacate -- they don't possibly fill the gap here, they
13 don't possibly -- other things they rely on is they got
14 two doctors to ultimately say that perhaps the pictures
15 of injuries she had could be consistent with several
16 alternative causes, but they couldn't really reliably
17 date when they were from, in any event. That's the
18 forensic evidence they had to try to say they weren't
19 relying on the accuser.

20 It is crystal-clear: If you don't rely
21 on the credibility of this accuser, you couldn't
22 possibly meet the credible evidence test. And we didn't
23 get a chance to cross-examine her, to have her as a
24 witness, to have the Arbitrator see that.

25 Secondly, to compound the injury, they

1 refused to produce the notes of the investigator who
2 interviewed her six times.

3 Now, the reason this is important is not
4 just, of course, they have said things that weren't
5 recorded. Out of the six interviews, two were
6 transcribed and four were not. So four, whatever we
7 know about them, is not based on a transcript. But
8 even when you have --

9 THE COURT: Mr. Kessler, you know,
10 Ms. Roberts testified that two of them were interviews
11 and then she said the other four were follow-ups.

12 MR. KESSLER: Yes, Your Honor --

13 THE COURT: The nature of -- they
14 weren't -- it seems like they weren't full-blown
15 interviews.

16 MR. KESSLER: What she did in her
17 testimony, is first she said two were full interviews
18 and four were follow-ups.

19 When I questioned her and pointed out
20 that she wrote that there were six interviews in her
21 report, she ultimately answered and said, "Yes, I guess
22 they're interviews."

23 So I don't want to quibble over words,
24 but she was distinguishing between follow-ups, you know,
25 as opposed to the basic interviews.

1 But the follow-ups were clearly, and Your
2 Honor can look at them yourself, were interviews
3 extensively about different issues that went to her
4 credibility. And, in fact, frequently the follow-ups
5 were Ms. Roberts' probing about the inconsistencies in
6 her testimony.

7 In other words, the reason she did the
8 follow-ups, in part, is because Ms. Roberts had so many
9 doubts about the credibility of this witness, that she
10 kept going back and saying, "well, this person, who was
11 a complete neutral, said this. What do you have to say
12 to that?" Or, "This person is inconsistent with what
13 you said the first two times."

14 So, for example, in her first two big
15 interviews, she never mentioned one of the five alleged
16 incidents at all, at all. It didn't come up until one
17 of the follow-ups that was there. Which also, of
18 course, goes to credibility.

19 My point here is, the investigator's
20 notes would have not just the words she said, but the
21 contemporaneous impressions of the investigators.

22 Because, if you know experienced
23 investigators, they would write "Inconsistency."
24 "Doesn't seem credible." You know, other points that
25 would have perhaps, perhaps cured a little bit of the

1 harm, and really wouldn't have overcome the harm of not
2 having her.

3 But the combination of denying both in a
4 case -- in a classic he-said/she-said case, and a policy
5 that requires credible evidence where the Arbitrator is
6 going to rule, as Mr. Nash said, he's going to rule on
7 whether or not she was credible, we know he's going to
8 rule on that in this hearing, and he's going to do it
9 without seeing her, without her being cross-examined,
10 without anything else, it utterly defies fundamental
11 fairness. So that's number one. And it's occurred now.
12 It can't be fixed. It's been denied twice.

13 THE COURT: Well, Ms. Roberts got to
14 testify, so the Arbiter certainly had the opportunity to
15 hear her and what her views were and what her opinions
16 were in deciding that. Because I don't think the
17 Commissioner, he never actually saw live testimony from
18 anybody.

19 MR. KESSLER: That is absolutely correct
20 about the Commissioner.

21 But with respect to the Arbitrator, we
22 heard Ms. Roberts give her testimony, and I will talk
23 about that in a minute.

24 And you also heard Ms. Friel separately
25 say, well, *she* thought that it was credible for all but

1 one of the five incidents.

2 So, really, that's not a substitute,
3 that's not a substitute for the Arbitrator being able to
4 decide whether there was credible evidence in this case.
5 And it's certainly not a substitute for my being able to
6 cross-examine this witness about many things, for
7 example, that may speak -- that she wasn't even asked by
8 the investigators but which would go directly to whether
9 or not --

10 And, a lot of times, the issue on these
11 appeals to the Arbitrator is whether you can induce new
12 evidence that the Commissioner did not even have before
13 it, because I will come to this next.

14 Their big argument to Mr. Henderson in
15 everyone of these arbitrations is that you should defer
16 to the fact-finding of the Commissioner, and only
17 disturb it if it really is arbitrary and capricious.
18 That's Mr. Nash's favorite refrain in his closings and
19 all of his arguments about that.

20 well, how can the Arbitrator decide, how
21 can we argue what you should defer to if you don't know
22 what the Commissioner actually knew? And this is the
23 second point.

24 when it became clear that Ms. Roberts'
25 conclusion -- which, frankly, was somewhat, as you might

1 imagine, earthshaking, came out that not only did she
2 think, quote, that the accuser had credibility issues,
3 but that in a review of all the evidence by the Lead
4 Investigator -- and I call her the Lead, because Kia --
5 Kia Roberts was the investigator who interviewed all 26
6 fact -- fact witnesses; Ms. Friel interviewed none.

7 Kia Roberts is the one who ran this
8 investigation. She's the one that knew all the
9 evidence. She was the co-author of the report. And she
10 concluded there was insufficient evidence to pursue any
11 violation at all. But that was not put into the
12 168-page investigative report.

13 Now, that then raised, well, what did the
14 Commissioner know? Because she did not get to meet with
15 the Commissioner. And this is undisputed. There was a
16 meeting with the Commissioner to discuss the findings of
17 the investigation in which Ms. Friel went and expressed
18 her view that she thought that there should be a
19 prosecution, that she did think it should go forward.
20 And Ms. Roberts, the one who interviewed all 26
21 witnesses, was excluded, not invited to that meeting.

22 And she testified she doesn't know why
23 she was excluded. She doesn't even know who made the
24 decision. She certainly thought it would be important
25 to talk to her.

1 Even more telling, more telling under the
2 PCP policy, they have four advisors who -- and it could
3 be four -- but they have expert advisors who are
4 supposed to review what happened and give the
5 Commissioner advice whether to impose discipline.
6 That's another part of the process.

7 So you have the big evidentiary report.
8 And in that report, 168 pages, and, by the way,
9 thousands of pages of exhibits, there's no conclusion.

10 Why is there no conclusion? Because if
11 Kia Roberts had to write a conclusion, she would write,
12 "I conclude, don't go forward." And they didn't want
13 anyone to know that.

14 So you get down to the meeting of the
15 four expert advisors. Ms. Friel is in attendance, but
16 not Ms. Roberts. She doesn't know why she's excluded
17 from that.

18 And why is that important? Well, the
19 expert advisors are going to advise the Commissioner,
20 right?

21 So, Mary Jo White, who is a former U.S.
22 Attorney, former head of the SE -- Chair -- Chair of the
23 SEC, someone who knows what questions to ask, asked Ms.
24 Friel at this meeting of the advisors, the only meeting
25 of the advisors we believe took place about this: Can

1 you tell me not that what you, Ms. Friel, conclude; she
2 says, can you tell me what did you and your
3 investigators include -- conclude about the credibility
4 of these allegations and what the evidence show?

5 And Ms. Friel flatly misrepresents the
6 truth to the four advisors. Flatly. What does she do?

7 She says, oh, July 22nd, one of the five
8 incidents, we thought was incredible.

9 well, she had to say that, because there
10 were e-mails showing that Ms. Thompson had asked her
11 friend to lie to the police about that incident. Not a
12 very credible way of alleging an allegation of abuse.

13 So she said, that's fine.

14 Then she goes, as for the others --
15 because Mary Jo White says, well, what about the others?
16 As for the others -- and Your Honor should read this --
17 it's a big question.

18 THE COURT: I have read it.

19 MR. KESSLER: And you know, she never
20 answers what should have been the answer, what would
21 have been the answer had Ms. -- had -- had Ms. Roberts
22 been in the room, Ms. Roberts would have said, well, I
23 personally concluded in my investigation, we didn't find
24 any of it to be credible.

25 Maybe Ms. Friel would have disagreed, and

1 then the four advisors could say, well, you're the one
2 that interviewed the 26 witnesses; and you're not. What
3 causes you, Ms. Friel, to draw a different conclusion?
4 And then they would be in a position to tell the
5 Commissioner what happened. But they were cut off, too.

6 So then -- and this is the most
7 incredible stuff of all. So we get to this issue of
8 what did the Commissioner know? And I commend Your
9 Honor -- actually, I shouldn't commend you; it's a hard
10 duty -- to read the testimony of Ms. Friel in this.

11 Ms. Friel is an experienced prosecutor
12 herself. She's a trained lawyer. I submit to you she
13 understands questions. She knows the significance of
14 the oath. She knows how to testify. Okay?

15 In the space of eight minutes of
16 examination, she changed her testimony five to six times
17 as to what the Commissioner was told. She gave every
18 variation from "I don't remember," to "I said something
19 about credibility," to "Maybe Ms. Kia Roberts said
20 something about credibility," to "I don't actually
21 remember what was said," to "Attorney-client privilege,"
22 to "Oh, yes, I told him about Kia's conclusions."

23 I mean, you look at that mess. Talk
24 about inconsistencies and incredible testimony. And,
25 again, Your Honor, just read it, just read it.

1 If your clerk goes through it, you're
2 going to be scratching your heads, "Say what!" This
3 changes every two minutes.

4 And I ask, I ask --

5 THE COURT: Mr. Kessler, so it's clear, I
6 have read it myself.

7 MR. KESSLER: Thank you. I apologize,
8 Your Honor.

9 THE COURT: You want to see my
10 transcript, I have marked those passages.

11 MR. KESSLER: You will see then -- you
12 will see that I asked -- finally, I got exasperated. I
13 said, "Well, you seem to have suddenly changed your mind
14 about what you remember from a few minutes ago. Did it
15 suddenly pop into your head?"

16 And her answer as a trained lawyer was,
17 "Well, my testimony speaks for itself." Okay.

18 Now, because of that uncertainty, we
19 needed Commissioner Goodell. Because Commissioner
20 Goodell could have told us, here's what I knew. Did I
21 know that Ms. Roberts had reached this conclusion or did
22 I just know that there were credibility issues?

23 In the -- in their brief and in the
24 public statement issued by the NFL in the last week,
25 what they say is, "The Commissioner knew everything."

1 why? well, because all the facts are in the report.
2 And, of course, what's not in the report is the
3 conclusion of Ms. Roberts. So the report is useless.

4 And this argument is, well, the
5 Commissioner could have read the 3000 pages of exhibits
6 and the 168 pages and all the backup and had reached his
7 own conclusion.

8 That's very different from the process
9 when you hire experienced criminal prosecutors to do an
10 investigation, to give you advice, and you have four
11 expert advisors and you expect them to know what's going
12 on, and to have all that, that's very different from
13 what's in the report.

14 And, number two, they say, well, I heard
15 there were credibility issues. Credibility issues as
16 Ms. Friel said, as she told the Commissioner, there was
17 credibility issues with everybody, so, therefore, you
18 can't decide on that. So here's another basis to impose
19 discipline.

20 So when you needed to know -- because the
21 argument, and I guarantee you as I'm sitting here now --
22 I give a lot of guarantees, okay -- when you see this
23 decision, whenever it comes out -- right now, the next
24 hour, tomorrow morning -- it's going to have a long
25 discussion about the standard of deferring to the

1 Commissioner, his fact-finding, and how we have to show
2 that his fact-finding is arbitrary and capricious.

3 How could we meet our burden on that
4 argument when we can't demonstrate, well, the
5 Commissioner didn't know any of this, it's new; so,
6 therefore, you don't defer on that at all. That's what
7 we needed to be able to do in this hearing, and we were
8 deprived on that as well.

9 So we believe under the fact-specific
10 standards of fundamental fairness, the combination of
11 these issues, okay, the combination of not knowing how
12 this conspiracy suppressed evidence of Commissioner
13 Goodell and what was involved and the scope of it, or
14 what he knew, and the inability on the fundamental issue
15 of credibility, this goes to fundamental fairness.

16 At the very least, Your Honor, at the
17 very least these are significant, difficult, important
18 questions that are worth maintaining the status quo
19 until you can have a whole hearing on these issues with
20 full briefing and discussion.

21 Obviously, we filed a 15-page TRO brief
22 and a Petition, but we have not yet fully briefed here
23 today, the full scope of these issues, which you are
24 entitled to do. So that's on the likelihood of success.

25 The other aspects of preliminary

1 injunction here, frankly, Your Honor, are overwhelming
2 and compelling. First, is irreparable injury. I don't
3 even know how they seriously contest this.

4 So we have cited to you decision after
5 decision after decision. I'm going to read to you the
6 list that's in our brief. *Brady, Starcaps, Virginia*
7 *Squires, Jackson, Bowman, Haywood, Linseman*, decision
8 after decision that recognize that when a professional
9 athlete is going to miss games, this is inherently
10 irreparable. Why? Because these careers are short.

11 God forbid, Mr. Elliott could go down to
12 an injury at any time. You can never recover these lost
13 moments of competitive opportunity, number one.

14 Number two, Mr. Elliott last year was in
15 the Pro Bowl his rookie year. Wouldn't it be incredible
16 if he could be in the Pro Bowl two years in a row; or
17 try doing that when you're missing six games, which is
18 almost half the NFL regular season. That might be too
19 much even for Mr. Elliott to try to achieve. All of
20 those honors, that recognition is lost. No money can
21 make that up.

22 The possibility of getting to the
23 playoffs, going deep into the playoffs, getting to the
24 Super Bowl, perhaps this is the Cowboys' year. I know I
25 have a few people back here that would like that to be

1 the case. Okay?

2 That opportunity in the NFL comes up
3 briefly for a moment. You don't know if this would be
4 the Cowboys' year, with their star running back for all
5 16 games, as opposed to not having him for six of these
6 games at the start of the NFL season. So that's why
7 case after case after case say this is irreparable in
8 terms of that.

9 That goes beyond even the fact that,
10 obviously, being suspended, you know, it's like Your
11 Honor knows this, when someone, you know, gets convicted
12 of something, that gets a lot of press, okay; when you
13 get acquitted, not so much.

14 So the damage to Mr. Elliott's reputation
15 of letting it go forward, that Mr. Henderson has -- if
16 he has, and I believe he will likely do this, says fine;
17 because when we're deprived of our opportunity, he will
18 probably sustain the discipline; because we didn't get a
19 chance to cross-examine the witness, because we couldn't
20 depose the Commissioner because of the high deference
21 standard he's going to apply, that's reputational harm,
22 that is very hard to ever get back again, in terms of
23 this.

24 He was vindicated by the police going
25 forward. As a matter of fact, the police didn't just go

1 forward, and the prosecutor, they said because of the
2 conflicting evidence and accounts on all incidents; in
3 other words, insufficient basis to conclude to go
4 forward. Now, I'm not saying a criminal standard
5 applies, it sure doesn't; but credible evidence applies,
6 and that's what we need to go back to.

7 So, I think irreparable harm is
8 self-evident here. Mr. Nash wants to spend time to
9 argue this, that's his choice. I don't think it's a
10 close question. Then you get the balance of hardship.

11 Balance of hardship is very important.
12 Because what the case law says in the Fifth Circuit, as
13 you know, is that if the harm to the Plaintiff here,
14 Mr. Elliott, is going to be irreparable, and the harm
15 claimed by the adversary is something that could be
16 easily remedied if it turns out that the injunction
17 should not have been granted, if, in fact, you decide to
18 affirm the arbitration, says then the balance of harm
19 overwhelmingly favors granting the relief.

20 Again, I commend the *Star caps* decision on
21 this. It has a very well-reasoned decision about this,
22 pointing out that if it turns out the arbitration should
23 have been affirmed. In fact, in *Star caps* ultimately the
24 arbitration was affirmed. They pointed out that the
25 players could then serve their suspension then. There's

1 no harm to any interest of the NFL. There's no harm to
2 anything that happens there.

3 And, in fact, in *Star caps*, they did serve
4 their suspension then. But the point was, the Court
5 said, if I have significant fundamental questions that
6 need to be answered, then I'm not going to allow
7 irreparable harm, because, first, when there's no real
8 harm to the other side. The other part of this balance
9 is not just Mr. Elliott, it's the Cowboys.

10 So we have two affidavit and declaration
11 in this case. One is from Mr. Elliott's agent, Mr.
12 Arceneaux, that details the facts of irreparable harm
13 and what it means to a NFL player and how this would
14 impact him irreparably. And then we have the affidavit
15 and declaration of Mr. Cohen, who is General Counsel of
16 the Cowboys, that I believe is sitting out in the
17 audience here in court today.

18 There are two significant things about
19 the Cohen declaration. One, it establishes
20 unequivocally the harm that will be caused, in addition
21 to Mr. Elliott, to the Dallas Cowboys in an irreparable
22 way if they are deprived of his services; and, in fact,
23 not just to the Cowboys, but to their fans, their season
24 ticketholders, others whose hearts and minds are locked
25 up into this team, in terms of that. That's all set

1 forth in the Cohen declaration in terms of that.

2 And, secondarily, Mr. Cohen was at the
3 arbitration and he heard and he saw and he reported that
4 the revelation from Kia Roberts about what her
5 conclusion was and how it wasn't something given to the
6 advisors and how it was not something she gave to the
7 Commissioner and how the Cowboys didn't know about it.
8 The Cowboys didn't know about it. He confirmed that in
9 his declaration. So why is that significant?

10 In the context of this arbitration
11 hearing, this was clearly an effort to suppress
12 evidence: The most fundamentally unfair thing. Now,
13 how do I know that?

14 We didn't only ask for Ms. -- Ms. Roberts
15 to testify -- I'm sorry. We didn't only ask for
16 Ms. Thompson to testify before the Commissioner, we
17 asked that Kia Roberts testify, but the NFL said no.

18 Here's what counsel said when they didn't
19 want Ms. Roberts to testify. We're -- we're producing
20 Lisa Friel and, therefore, Ms. Roberts' testimony will
21 be cumulative of Ms. Friel's testimony.

22 Your Honor, you've been in courts a long
23 time. What would you do if a counsel made that
24 representation in your court and tried to use that to
25 keep Ms. Roberts from testifying about what her

1 conclusions are, which they knew were diametrically
2 opposed to Ms. Friel, and that Ms. Friel was the one who
3 decided, with counsel, that Ms. Roberts or anyone's
4 conclusions would not be in that evidentiary report so
5 it would be kept from the player, from the Cowboys, from
6 the Commissioner, I would assert, from the advisors?
7 what does that do to the fundamental fairness here?

8 So, the balance of hardships, we believe,
9 precisely favor maintaining the status quo; give this
10 Court the time to study these issues; to have full
11 briefing; to have argument, and then justice will be
12 done.

13 I am going to conclude, Your Honor, by
14 simply saying the following: The last fact is the
15 public interest. And, again, I commend you to the
16 *Star caps* decision.

17 The public interest is vindicated when
18 employees are not improperly suspended, disciplined
19 without a fundamentally fair process. This is the rule
20 of law.

21 You know, I noticed, when the crowd was
22 coming in, we have some children in this room. I assume
23 they're little Cowboys fans who came here to see
24 Mr. Elliott.

25 Before Mr. Elliott gets suspended, and

1 everything that means for him as a player and his team
2 and his reputation, before anyone in this process of
3 arbitration can suffer those types of consequences,
4 particularly in a policy like this, where the
5 allegations are quite severe -- and, frankly, if someone
6 engages in domestic violence, this Union believes there
7 should be significant penalties. That's not the issue
8 in this case. I would hope everybody would think that.

9 This is about somebody wrongly accused,
10 where the investigators concluded there was no basis to
11 go forward, and was denied a fair process.

12 I believe Your Honor should issue this
13 TRO after the decision is rendered. You don't have to
14 issue it now. I think it would be quite proper for you
15 to wait till tomorrow; because now we have a
16 representation from the League that the decision will
17 not go into effect until next Tuesday, so therefore --
18 and by the way, that's a new representation from the
19 League. But now that they have said that -- because I
20 guess it's past their limit, in terms of that. Now that
21 we know that.

22 Then you can issue your decision, and you
23 will decide for yourself the time to carefully decide as
24 a Court whether fundamental fairness existed here or
25 whether it did not.

1 I believe that's the only just outcome,
2 and I think it's the one that every Cowboys fan, every
3 person, but most importantly and especially the accused,
4 Mr. Elliott, deserves from the arbitral process.

5 Thank you very much.

6 THE COURT: Mr. Kessler, before you sit
7 down, there's one question that you didn't really
8 address just generally.

9 Because looking -- judicial review of
10 these kind of decisions is extremely narrow, and you
11 didn't really talk about that.

12 And I went back and read, which I had
13 never read before, the *Brady* decision. Of course, the
14 District Judge sided with you and your client.

15 Then the Second Circuit -- now, that's
16 not binding upon this Court -- in reading the Second
17 Circuit decision, I don't know one would ever have
18 survived a District Judge vacating an award of the
19 Second Court, based on reading that decision.

20 Now, we don't have that in our Court
21 because the Fifth Circuit hasn't done -- I don't think
22 they've ever reached the issue regarding the NFL. But
23 it is extremely narrow what the Court looks at.

24 And so the Court, especially as Mr. Nash
25 pointed out, and I think he's correct, he's got

1 evidentiary decisions, it has to be pretty severe to get
2 over that hump.

3 So in terms of the small, narrow window
4 the Court looks at, why -- why is this case -- that case
5 that is of such a fundamental error that he was denied a
6 fair hearing? If you don't mind just answering that
7 question, considering because my review, if I reach that
8 decision, is so narrow.

9 MR. KESSLER: Your Honor, I'm glad you
10 raised *Brady*. I meant to cover it, so I thank you for
11 raising it.

12 I believe the decision in *Brady* is not
13 only completely distinguishable, but it actually
14 supports finding fundamental unfairness here, and I will
15 explain why.

16 The fundamental fairness argued in *Brady*
17 related to two things: The fairness to order the
18 deposition of Jeffrey Pash, who was the General Counsel
19 of the NFL, and the failure to produce certain of the
20 investigator notes of the Paul Weiss law firm.

21 In that, those were the two fundamental
22 issues. Everything else in *Brady*, in the notice issue,
23 have nothing to do with the issues here.

24 What the Second Circuit did is they
25 reaffirmed, they didn't deny, that where the Arbitrator

1 refused to hear evidence pertinent and material to the
2 controversy, there would be vacatur. In other words,
3 the law in the Second Circuit is there would be.

4 But they looked at the specific facts
5 there and they found two things. They found that Mr.
6 Pash's testimony was collateral testimony because he had
7 only minimum involvement in the investigative report.
8 And Mr. Wells, who was the principal investigator, who
9 had testified at length, and, therefore, what they said
10 is that this was an issue that was collateral, and,
11 therefore, didn't meet the standard of being evidence
12 pertinent and material to the controversy.

13 Second, when they got to the investigator
14 notes, they said the same things, that the League had
15 already produced all of the NFL documents considered by
16 the Investigators and that no material factual disputes
17 that could be revealed by the Paul Weiss notes, in
18 addition, had been identified.

19 So what the Second Circuit did is
20 specifically accept the principle that if it was
21 material and pertinent, they would have overturned the
22 Arbitrator on that ground; but they said, these
23 complaints were not.

24 Now, compare those issues, Mr. Pash's
25 testimony, when he had his name in a press release

1 saying he was the co-investigator, but he then testified
2 to Mr. Wells he never really did anything. So,
3 therefore, the Court said his testimony was collateral,
4 when all he did was review a draft and give some
5 comments. So the Court said, well, that's not -- that's
6 not central or pertinent or material.

7 And in Paul Weiss' investigative notes
8 there, which the Court said had already been covered by
9 everything else produced by the League, and compare that
10 to the fundamental issue of credibility? Number one.
11 When the Policy says credible evidence is the test and
12 our burden, there could not be another witness more
13 pertinent, more necessary, more material than Ms.
14 Thompson. That is the fundamental difference on her.

15 Secondarily, because we uncovered this
16 conspiracy to suppress evidence and we had this burden
17 to show what the Commissioner knew and didn't know, so
18 that we -- so that you wouldn't defer to him for things
19 he didn't know, the Commissioner Goodell's testimony was
20 directly essential.

21 So this came up in another proceeding
22 involving Ray Rice, where instead of appointing Mr.
23 Henderson as the Arbitrator, the League appointed a true
24 neutral, because we were alleging bias, and they
25 appointed former Judge Barbara Jones of the Southern

1 District of New York.

2 And Barbara Jones ruled that there
3 Commissioner Tagliabue had to testify -- I'm sorry,
4 Commissioner Goodell had to testify. She compelled it.
5 She said why? Because his testimony -- and Judge Jones,
6 in light of fundamental fairness, and she sat like you,
7 in a District Court -- she said his testimony went to a
8 central issue in the case of what the Commissioner knew
9 and didn't know in the context of that dispute, because
10 there, that was a controlling issue there, and she
11 ordered the testimony, Commissioner Goodell testified,
12 we met our burden, and the discipline was vacated.

13 That's what we've been deprived of here.

14 So I am happy for Your Honor to review
15 the specific context of *Brady* and those rulings. And I
16 would submit that had this case been before that panel
17 in the Second Circuit, applying their own standards,
18 they would have reached a very different conclusion on
19 material and necessary, even though I agree with Your
20 Honor, obviously that's another Circuit and does not in
21 any way control, in any event. But the point here is,
22 it's a fact-specific inquiry.

23 They also argue the *Adrian Peterson* case
24 in the Eighth Circuit there the issue was retroactive
25 application of a policy. And the Court of Appeals in

1 the Eighth Circuit ended up saying that the Eighth
2 Circuit doesn't even recognize fundamental fairness as a
3 separate grounds. So it differs from the Fifth Circuit.
4 So, therefore, it's not applicable for that. And
5 there's been a split in the circuits about that.

6 But secondarily said, what was argued
7 there as being fundamentally unfair was just all being
8 the retroactivity of the Policy, which they had already
9 said was for the Arbitrator to decide under the
10 agreement, which is why we lost in *Peterson*, having
11 nothing to do with anything here.

12 So, Your Honor, as you know, as it may
13 well turn out to be the case, the standards are what
14 they are. And we believe the clear issue is how do you
15 apply them to the specific facts here.

16 We believe that at the very least we have
17 raised substantial, difficult, important issues as to
18 whether this testimony was material and pertinent. I'm
19 using now the words of the FAA, which the Court of
20 Appeals has said you look to, in interpreting the
21 vacatur rules of fundamental fairness, that's the *Gulf*
22 *Coast Industries* case.

23 THE COURT: Thank you, Mr. Kessler.

24 MR. KESSLER: Thank you.

25 Mr. Nash.

1 MR. NASH: Thank you, Your Honor.

2 It's been a long time.

3 well, you just heard a lot of arguments
4 about the evidence and the hearing, the testimony of
5 various witnesses, the meeting of the standard under the
6 Personal Conduct Policy that the Arbitrator is supposed
7 to apply.

8 These are all arguments, Your Honor,
9 that -- and I think you said you -- you read the
10 transcript. It probably sounded familiar. And the
11 reason they probably sounded familiar is that they were
12 virtually a repeat of the very lengthy closing argument
13 that counsel made at the end of the arbitration
14 proceeding. And I would submit a couple of things about
15 that. One is, it proved the point that I made earlier.
16 These arguments are before the Arbitrator. These are
17 the arguments that he made.

18 I got a chance to respond and that's also
19 in the transcript. And, in responding, I got a chance
20 to point out that the factual claims that he made about
21 the so-called conspiracy about Ms. Roberts and what was
22 provided to the Commissioner were not correct. That if
23 the Arbitrator looked at the evidence, if he read the
24 testimony or remembered the testimony of both Kia
25 Roberts and Lisa Friel -- who, by the way, I believe

1 testified completely consistently -- they gave the same
2 testimony.

3 Ms. Roberts was quite clear, because she
4 was asked quite directly, she had concerns about
5 credibility of -- of the witness. She expressed those
6 concerns. She -- she documented those concerns. She
7 put them in the investigative report. And both
8 Ms. Roberts and Ms. Friel said directly, that was all
9 included.

10 In fact, Ms. Roberts prepared a memo,
11 which was Exhibit 99 to the investigative report, that
12 counsel got to cross-examine her about, in which she
13 outlined here are the credibility problems with Ms.
14 Thompson.

15 Now, she also said she had a number of
16 credibility problems with -- with what Mr. Elliott had
17 to say, and that was also included in the report.

18 And to the point about the notes, and you
19 correctly pointed out about the -- about the interviews
20 that she conducted of Ms. Thompson, she did have the two
21 interviews and then follow-up calls. She actually
22 had -- they had recordings of those interviews. They
23 had absolute verbatim transcripts of those interviews,
24 and she had notes of the others, and -- and she was
25 asked, I think it's on Page 249 and 250 of the -- of the

1 transcript: Did you include everything from your notes
2 concerning your conversation with Ms. Thompson into the
3 report?

4 She made summaries. It wasn't a verbatim
5 transcript, but she actually summarized exactly what
6 Ms. Thompson had told her. And she said, I included
7 everything, everything.

8 So -- and -- and as far as the -- the
9 information that went to the Commissioner, Ms. Friel
10 testified that she, in fact, made sure all of that was
11 included in the report to the Commissioner and that she
12 herself told the Commissioner about Ms. Roberts'
13 concerns.

14 We had this back-and-forth argument. I
15 don't -- I would suggest, Your Honor, it -- it wouldn't
16 be the Court's role to resolve those sort of factual
17 questions: whether I'm right, whether Mr. Kessler is
18 right. He may get back up here and say, "Oh, no, no.
19 She said this." But that's what the point of the
20 arbitration hearing was about, and that is why we don't
21 know, until the award is issued, how the -- how the
22 Arbitrator is going to resolve that; nor do we know, nor
23 do we know how the Arbitrator is going to resolve Mr.
24 Kessler's arguments about this so-called credible
25 evidence standard and whether it is, in his view, unfair

1 that the information that was provided to the
2 Commissioner only had the interview summaries, he didn't
3 meet directly with Kia Roberts, all of those -- all of
4 those things, whether that was unfair.

5 And that, I would submit, Your Honor,
6 whether this one was fair and consistent is a question
7 about how the Policy is to be applied. And in that --
8 and I think we made this point in our -- in our papers
9 and I think one thing is particularly clear.

10 I understand that Counsel believes that
11 it wasn't sufficient in his view for all of the evidence
12 about the credibility of Ms. Thompson and the
13 credibility of Mr. Elliott to be put in the report
14 that -- that, you know, Kia Roberts had to meet with the
15 Commissioner; something like -- but that's a question
16 about how the Policy is to be administered.

17 And in that respect and as I pointed out
18 in my closing argument to Arbitrator Henderson and I
19 think we pointed out somewhat in our brief, the thing
20 that they leave out -- leave out is, is that after
21 Ms. Roberts had expressed those concerns about
22 credibility, there was -- there was additional
23 proceedings, there was additional -- an additional
24 interview of Mr. Elliott.

25 Now, keep in mind, when Mr. Elliott,

1 before I argue the case again, I feel some need to make
2 a few of these points.

3 When Mr. Elliott was first interviewed by
4 Kia Roberts at the beginning of the case, at that point,
5 she didn't have all of the text messages that the League
6 was able to collect.

7 She didn't have all of the photographs of
8 the injuries that Ms. Thompson provided.

9 She didn't have the expert metadata that
10 confirms Ms. Roberts' story -- I'm sorry, Ms. Thompson's
11 story that the photographs were taken that week when she
12 said they were taken.

13 And she didn't have all of the text
14 messages that -- between -- between Ms. Thompson and
15 others, where Ms. Thompson reported these things
16 contemporaneously, making her arguably more credible.

17 And also the text messages that show that
18 Mr. Elliott was not truthful to the police, was not
19 truthful with Ms. Roberts when she first interviewed
20 him, she didn't have that.

21 Ms. Friel had that after all of this
22 when -- after these -- after the concerns that
23 Ms. Roberts had about the witness' credibility or
24 Ms. Thompson's credibility was put in the report. It
25 was given to the Players Association, it was given to

1 Mr. Elliott's representatives, and then they had a
2 further meeting where -- where Ms. Friel then had the
3 opportunity to question Mr. Elliott about those --
4 those -- that additional evidence. That's information
5 that Ms. Roberts didn't have. And there's a transcript
6 of that in the record.

7 And, also, there's testimony from
8 Ms. Friel in the arbitration hearing about the
9 significance of that injury. How she found, and
10 presumably the Commissioner found when he got to review
11 the transcript -- because his letter, by the way, said
12 that was one of the things he reviewed in making the
13 disciplinary determination. It wasn't just the original
14 investigative report, but it was also the subsequent
15 transcript of the -- the meeting with Mr. Elliott and
16 his advisors in which Ms. Friel was able to put before
17 Mr. Elliott a number of contradictions and -- and to
18 further develop the evidence, which leads --

19 THE COURT: Wasn't Ms. Roberts the only
20 one to actually interview Ms. Thompson?

21 MR. NASH: Yes.

22 THE COURT: And so as a former
23 prosecutor, she made certain findings about credibility
24 there.

25 MR. NASH: She did not. She said she

1 didn't make any findings, that wasn't her role. She --
2 she -- she had -- and actually what she said, and this
3 is important, this is -- one of their arguments has been
4 that in order -- the only way anyone can make a
5 credibility determination is to meet personally with the
6 witness. And this goes to their confront-the-accuser
7 argument, which I will get to in a minute.

8 But Ms. Roberts testified, as did
9 Ms. Friel, that no, that's not the -- necessarily the
10 way you can determine whether someone's telling the
11 truth.

12 I think Ms. Roberts said, I don't know
13 Tiffany Thompson. I don't know Ezekiel Elliott. He's
14 not my husband, she is not my husband. I know when my
15 husband is lying, but I can't just look at somebody and
16 determine. So what I have to do is get their story and
17 then I have to do all the legwork, which included all
18 the other work that -- that she and Ms. Friel did over
19 the course of the year, and -- and that was put into the
20 report. So there's no question that she examined what
21 Ms. Thompson had to say.

22 One of the reasons she brought it up is
23 she wanted to make sure she had all of the evidence, one
24 way or the other, so that the Commissioner -- so it
25 could be put into the report for the Commissioner. So

1 it -- it -- and it was not her responsibility to make,
2 and she said that quite directly as well.

3 Now, which leads to the, what I think
4 will be, if we ever get there, Your Honor, if we ever --
5 if we ever get -- you know, once we get an award, if
6 you're inclined to review it. What -- what the -- what
7 one of the issues is going to be is what are the
8 Arbitrator's findings about these issues. Which I
9 think, under standard review, I think you know, is
10 something that we shouldn't be in here retrying the
11 case.

12 But maybe even more importantly, what is
13 the Arbitrator's interpretation of the Collective
14 Bargaining Agreement. And -- and that's where you get
15 into when Counsel says, oh, this is not consistent with
16 the CBA.

17 I mean, I think they say, by the way, in
18 their -- in their brief that they submitted today, on a
19 number of -- number of occasions, they say injunctive
20 relief is required because he's being deprived of his
21 CBA rights.

22 Well, the question of whether Mr. Elliott
23 has been deprived of his CBA rights is for the
24 Arbitrator. That's fundamentally an issue of contract
25 interpretation.

1 So, you know, if Mr. Kessler is right
2 about his interpretation of the Policy, the Arbitrator
3 can agree with him.

4 Now, again, on that point, and we point
5 this out, under the Policy, only the Commissioner may
6 decide, make the ultimate decision that he says, you
7 know, well, you should -- he should have -- it should be
8 Kia Roberts, it should be Lisa Friel.

9 The investigators can have a
10 disagreement, the members of the Commissioner's staff
11 can have a disagreement about how to look at things, but
12 ultimately, under the Collective Bargaining Agreement,
13 under Article 46, it's the Commissioner's judgment that
14 matters.

15 And -- and under the Personal Conduct
16 Policy, it says quite clearly that the Commissioner can
17 rely on a variety of information.

18 And the reason we know that, we submitted
19 a decision to Your Honor attached to Mr. Gambrell's
20 declaration. This was an issue we just had last year,
21 when Commissioner Goodell announced the Personal Conduct
22 Policy, he had originally contemplated using a
23 disciplinary officer to make some of these decisions.
24 And they said, you can't do that. Under Article 46 of
25 the Collective Bargaining Agreement, only the

1 Commissioner can do that. That cannot be delegated to
2 the staff.

3 So, one of the arguments I made to the
4 Arbitrator, and I don't know if he's going to agree with
5 me or not, it's going to be up to him to review the
6 arbitration decision that we submitted to you, and he's
7 going to determine the significance of all of these
8 arguments under the Policy.

9 And that's where the *Brady* and the
10 *Peterson* cases matter so much.

11 Now, I -- I -- when we talk about -- when
12 we talk about fundamental fairness, I think I suggested
13 earlier and, you know, when he relies on *Gulf Coast*,
14 that's -- that's just fine. Arbitrator didn't hold a
15 hearing. That's fine. I think that's a pretty extreme
16 case.

17 But there are other Fifth Circuit cases,
18 I think including the chemical company case we cite,
19 where the Fifth Circuit says it's not the Court's rule
20 to look over the shoulder of the -- of the Arbitrator
21 and second-guess these kinds of judgments.

22 The Supreme Court has said this
23 repeatedly. They said it in the *Misco* case, they said
24 it in the *Garvey* case. It is not for the Courts to come
25 in and say, "Did you get this procedural question

1 right?"

2 And -- and this is -- and so in terms of
3 there -- I understand that they want to -- and I think
4 your point about the *Brady* case is exactly right. I --
5 I think it highlights the very important -- I mean, I
6 think the Court there made it clear.

7 And there was a case where the District
8 Judge reversed an arbitration decision, the
9 Commissioner's decision in that case based on the FAA.
10 Second Circuit said, no, no, no. In all of our cases --
11 their review is exceedingly high. It is not our job to
12 review the merits in the dispute, the equities in
13 dispute, and the procedural questions that arise out of
14 the dispute.

15 And I would submit, Your Honor, no matter
16 how they try to distinguish the *Brady* case, the issue
17 that they challenged, we didn't get the notes, that's
18 what they say about Kia Roberts. We didn't get the
19 testimony of a particular witness. That's what
20 they say.

21 And I don't think the Second Circuit
22 could be clearer, and they did so in terms that while
23 it's not a Fifth Circuit case, I would submit, it is --
24 it's full of Supreme Court's authority. I think it's
25 grounded in Supreme Court authority. And I think it is

1 directly applicable here.

2 And -- and, again, they say -- and this
3 gets to the very first point that Mr. Kessler said,
4 these questions have to be evaluated in context. Well,
5 I agree with that. And -- and they have to be evaluated
6 in the context of the Collective Bargaining Agreement.

7 And so when he -- his essential argument
8 is, he talks broadly about fundamental fairness that
9 applies in all labor arbitration decisions. But he, I
10 think, ignores how narrow that concept has been applied.

11 So in -- in both *Brady* and *Peterson*, the
12 courts actually wrestle with whether fundamental
13 fairness is even a basis to vacate an arbitration award.
14 And the reason they do that, Your Honor, I think you can
15 see, would be obvious.

16 You start talking about fairness. You're
17 down the road of sort of second-guessing the Arbitrator,
18 and you're doing the things that the Supreme Court has
19 repeatedly said, you know, a court ought not to do.

20 So -- and -- and in each of those cases,
21 they said, you have -- and what's required is what's
22 required under the Policy. So discovery, for example,
23 witnesses. It's not a criminal case. It's not this
24 idea that you -- you -- it's not fair if you don't get
25 to confront your accuser.

1 By the way, one of the arguments that I
2 made on this point to the Arbitrator was under the
3 Policy, his -- his decision not to compel Ms. Thompson
4 was fully -- not only is it fully consistent with the
5 Policy because -- and I think he explains it in his
6 decision and I think it speaks for itself -- but I
7 pointed out to him in my closing argument, it's also
8 consistent with the Policy that makes clear that victims
9 who come forward and complain about domestic or dating
10 violence are to be protected against harassment and
11 bullying and the like.

12 And I -- and I argued to the Arbitrator
13 not -- you know, not forcing her to come in and go
14 through the kinds of things that we're -- we're talking
15 about here today, which is fully consistent.

16 And so there's no -- there's no -- I
17 think his decision was clearly grounded in the Policy.
18 And it's not akin to *Gulf Coast* or cases where, you
19 know, there's Arbitrator misconduct.

20 Keep in mind this whole fundamental
21 fairness, it's borrowed, and I think he did identify the
22 section of the FAA where it talks about Arbitrator
23 misconduct.

24 THE COURT: Mr. Nash, what is the NFL's
25 position on -- in domestic violence situations? Is it

1 the NFL's position that a witness should never be -- the
2 alleged accuser ever be -- come to testify?

3 I mean, is it -- is it the NFL's position
4 that there's never a situation where that testimony
5 should be at a hearing by the Arbiter?

6 MR. NASH: Well, I would -- I would -- I
7 don't know that I can answer in every single case, I can
8 answer in this case; where as the -- as the Arbitrator
9 held, the Commissioner's decision did not depend just
10 upon Ms. Thompson's testimony or -- or interviews
11 with -- with Ms. Roberts, it depended upon the entire
12 record.

13 And that's why they went through the
14 lengthy and detailed investigation that they did.
15 That's why they got medical experts. That's why -- to
16 confirm that the -- that the photos showed injuries that
17 were consistent with what Ms. Thompson said happened.
18 And -- and that's why they got Mr. Elliott's text and
19 all that.

20 So, I think for purposes of certainly
21 this case, it was well within -- and I think the
22 question, the legal question is whether there's some,
23 you know, right to the accuser -- right to confront the
24 accuser that applies in every arb -- disciplinary
25 arbitration..

1 Your Honor, there are disciplinary
2 arbitrations that happen all the time where you don't
3 get to necessarily confront your -- your accuser.

4 And the question is what -- whether under
5 this particular Collective Bargaining Agreement that is
6 something that is required. And that is a question of
7 contract interpretation.

8 And one of the -- and so I understand
9 your point that's a Second Circuit case and *Peterson* is
10 in the Eighth Circuit. We also have other cases that we
11 pulled up.

12 But we do have a case in Texas, Your
13 Honor. We do have a case in the Northern District of
14 Texas on this very point. It's Judge Fitzwater's
15 decision in the *Holmes* case.

16 And I'm dating myself, because I -- I
17 argued that case long ago. But there was a case where a
18 player challenged his suspension under Article -- under
19 this -- virtually -- now -- now, it was under the drug
20 policy, and so things have changed somewhat, but the --
21 but the issue there was he was challenging his
22 suspension.

23 His appeal was heard by the Commissioner.
24 In that case, Commissioner Tagliabue. And he argued
25 that he had a right to confront his accuser, he had a

1 right to all sorts of other evidence, and Commissioner
2 Tagliabue made the judgment -- he made judgments. No,
3 under that circumstance and those facts, he didn't grant
4 those motions, and so he sued in Federal Court.

5 And Judge Fitzwater, in language -- and I
6 think we quoted it, and I think we even have a block
7 quote in language that's directly applicable here -- he
8 rejected this very right-to-confront argument that he
9 says applies to all labor arbitrations.

10 THE COURT: I'm not aware of that case.
11 But I presume that case did not have a credible evidence
12 standard that the Arbiter -- or the Commissioner would
13 have to apply to find a violation of the drug policy?

14 MR. NASH: Well, whether it's a credible
15 evidence case -- we are now also arguing about what
16 the -- what the Policy -- what the -- you know, what the
17 contract requires.

18 But it had a -- it certainly had a burden
19 for finding a violation that had to be met. Okay? And
20 so -- and the player argued, well, in order for me to
21 meet, you know, my burden, I need certain -- you know, I
22 need to confront witnesses, and the like.

23 And Commissioner Tagliabue said, no,
24 that's not the way it works under this Policy.

25 And Judge Fitzwater said that's entirely

1 consistent -- that's -- that's a decision grounded in
2 the Policy -- in the -- in the contract. And he said
3 the only way, the only way for the -- for a Federal
4 Judge to second-guess that kind of a decision is if he
5 determines that the Arbitrator committed misconduct.
6 And then he goes on to say, "And that would be a very
7 rare circumstance indeed."

8 There is no allegation here that in
9 making these procedural judgments that Arbitrator
10 Henderson engaged in any kind of misconduct. He made a
11 judgment.

12 And -- and one of the things is he said
13 you've been given all this voluminous evidence. The
14 purpose of this disciplinary appeal, it's not a de novo
15 hearing on the -- on the underlying violations. There
16 had been lots of prior meetings and evidence developed
17 upon which the -- the Commissioner made his judgment.
18 You've been given everything that -- that you're
19 entitled to. And that's true for his decision not to
20 compel testimony from -- from Com -- from Commissioner
21 Goodell.

22 Those are just purely procedural
23 questions, Your Honor.

24 THE COURT: well, Mr. Nash, you know,
25 looking at this issue, I would agree generally with this

1 premise that an accuser, in most situations, wouldn't
2 have to be compelled to testify; but you have this
3 additional fact, this theory that the Petitioner argues,
4 about Ms. Roberts. And, of course, we have to look at
5 that question in relation to was it fundamentally unfair
6 not to have Ms. Thompson testify.

7 When we consider that the person who did
8 the investigation -- and let's be fair to them -- is the
9 NFL knew what she knew, but they did not know until the
10 hearing.

11 I mean, and of course, their first -- you
12 have the NFL saying that they don't want to produce her,
13 saying she's cumulative. Clearly, she was not
14 cumulative. And so that was wrong.

15 Second, you know, Ms. Roberts has certain
16 opinions and she was kept out of certain meetings,
17 including the meetings with the four advisors. She was
18 kept out of any meeting with the Commissioner. And even
19 with the four advisors, it is correct, Ms. Friel, the
20 way she -- she crafts her answer like a lawyer does.

21 And so I don't think her answers, looking
22 at her testimony, doesn't fully -- doesn't fully
23 disclose to an -- being asked a question by one of the
24 advisors, doesn't fully express the opinions given by
25 Ms. Roberts.

1 Then we also have a situation of
2 Ms. Roberts not -- her conclusions. And -- and I'll
3 give you, none of the conclusions were in the report by
4 Ms. Friel or by Ms. Roberts, but it's been represented
5 in the past, the Com -- past reports have included that.

6 So their argument is there's some kind of
7 suppression of this -- of this dissenting opinion.

8 And then we go to the question what did
9 the Commissioner know. I know that's a separate issue,
10 but it's the same fundamental issue here we're dealing
11 with, is whether he should have been allowed to testify.

12 And that's -- the question is, is that
13 fundamentally unfair that he wasn't forced to testify;
14 when the fact is, we don't fully know what he was --
15 what he knows.

16 Ms. Friel's testimony is far from clear
17 about every single aspect of Ms. Roberts' opinions.

18 So, yes, maybe he knows something, but we
19 don't know the full extent.

20 So when you look at everything there,
21 doesn't that change the situation about whether --
22 whether or not it is fundamentally unfair that
23 Ms. Thompson and the Commissioner aren't forced to
24 testify?

25 MR. NASH: I would suggest, Your Honor,

1 it's not, and I -- and I would most importantly say,
2 those are -- you just outlined Counsel's arguments.
3 Those are arguments that were made to the Arbitrator.
4 Again --

5 THE COURT: And the Arbitrator -- I mean,
6 the issue's ripe for me, at least for the purposes of
7 the record. The Arbiter made decisions on that.

8 And so he denied Ms. Thompson appearing
9 or ask the NFL to try to make that happen, and he denied
10 the request to have the Commissioner come testify at the
11 arbitration hearing.

12 The fact that Mr. Kessler made some
13 argument about that, in terms of mitigation, well, that
14 may lower -- that may lower the award maybe, or whatever
15 he does on his -- if doesn't -- if he affirms the award
16 but lowers the penalty. But those issues are already
17 decided for this Court, in terms of examining whether
18 that's fundamentally fair or not.

19 MR. NASH: Well, again, just a few
20 things.

21 First of all, on the point about
22 Ms. Roberts, the Arbitrator did compel her testimony,
23 and I would --

24 THE COURT: Right. But over the -- I
25 mean -- but -- and I'm not saying there is a conspiracy

1 or not. I'm just saying that that's their argument.

2 when you look at the whole series of
3 events -- I mean, the NFL knows what Ms. Roberts knows,
4 but they excluded her from the hearing.

5 MR. NASH: Your Honor, I have to -- one of
6 the things that I think is unfortunate is how that
7 accusations fly, and I think it's -- and I think it's
8 just wrong.

9 You have to understand the context of --
10 of the internal appeals procedures that are followed
11 here. These are expedited procedures. This -- the
12 argument about, you know, what witnesses, how many
13 witnesses, these are arguments that get -- that get
14 resolved.

15 And, by the way, I think this is -- this
16 may be the first time that more than one -- typically,
17 it's the Lead Investigator; that's -- that's the
18 practice. That was that basis of the NFL's objection
19 not to have both; you can have Ms. Friel.

20 And, again, I think what -- what
21 Ms. Roberts said was completely consistent with what Ms.
22 Friel said.

23 So, I think the suggestion that there's
24 some sort of conspiracy there is really wrong. And it
25 was their argument they made to the -- to -- they made

1 that to the Arbitrator and -- and he can certainly
2 resolve it. But it's simply wrong.

3 But again, Your Honor, the -- the other
4 thing that I think has to be, you know, I think is just
5 sort of wrong about this premise, is that their --
6 Ms. Roberts had -- had -- had a view about things before
7 the end of everything, right before Mr. -- Mr. Elliott
8 was questioned again. And she went out of her way not
9 only to include all of that -- all of the evidence that
10 supported the views that she had, but she prepared a
11 memo on it.

12 And -- and when -- when I think you said
13 that they didn't know. They were given all of this.
14 And -- and I don't -- and so it's now up to the
15 Arbitrator to decide whether -- you know, whether that
16 was sufficient under the Policy. I would argue that it
17 absolutely was, because it was not Ms. Roberts' decision
18 to make, it was the Commissioner's decision to make.

19 And I think I would argue that the fair
20 reading of Ms. Friel's testimony is, is that all of that
21 was provided to the Commissioner. I just -- I mean, you
22 may have a different way to read it, but I argue that
23 she absolutely --

24 THE COURT: No, I think her words are,
25 well, not in so -- "not in the words they're using," or

1 "not in so many words," or something of that nature.

2 I mean, I've read it.

3 And so Ms. Friel, again, gives very
4 lawyer-like answers and clearly does a good job of that.

5 But it is unclear reading that exactly
6 what was told to the Commissioner in terms of the
7 details of what Ms. Roberts said.

8 And, again, you haven't answered the
9 question; and maybe because I spoke so long and it
10 wasn't clear.

11 The question I'm asking you is, is that
12 why does not the fact of all of these series of events
13 about the handling of Ms. Roberts, why doesn't that make
14 it fundamentally unfair and change the situation where
15 nobody would bring the accuser into a hearing, well,
16 then it becomes fundamentally unfair when you have all
17 those sequence of events.

18 Those are events that are very different
19 that you normally wouldn't see.

20 So why doesn't that change it and make it
21 fundamentally unfair to both the Commissioner and
22 Ms. Thompson, when the ultimate decision is credibility?

23 MR. NASH: Well, again, this is the
24 argument that they made to the Arbitrator. And the
25 standard of review hearing in arbitration --

1 THE COURT: What I am saying is, I mean,
2 for me -- I'm not saying what the decision is. What I'm
3 saying is, let's assume I accept that argument, accept
4 that -- I accept that argument. You're right, the
5 Arbiter, Mr. Henderson, made a decision. And if I make
6 that decision, it's an error.

7 The question is: Is the error so much
8 that it's fundamentally unfair?

9 Because procedural errors are fine unless
10 it becomes fundamentally unfair and causes prejudice.

11 So assume for me that that's the case.
12 So tell me why that wouldn't be fundamentally unfair if
13 I -- if we presume there are some conspiracy or -- and
14 why those two witnesses shouldn't have been forced to
15 testify.

16 MR. NASH: Well, I think the answer is in
17 the Arbitrator's written decision on this very point.

18 He issued a written decision as to why
19 Ms. Thompson would not be required to testify. First of
20 all --

21 THE COURT: But he also made that
22 decision before everything got flushed out regarding
23 Ms. Roberts, too.

24 MR. NASH: Well, they were free to -- I
25 mean, they made that argument. I mean, they -- I mean,

1 all of these arguments were made.

2 I think if you go through the record,
3 they have made all of these arguments, they renewed
4 those arguments. So I don't think there's any ques --

5 And, again, for all I know, the
6 Arbitrator will agree with your assessment of what's
7 fair, or he'll agree with your way of reading
8 Ms. Friel's testimony, or he'll have a different way of,
9 you know, reading Ms. Friel's testimony. I -- I don't
10 know the answer to that.

11 What I can say, Your Honor, is -- and
12 this -- again, this gets back to, I think it's Judge
13 Fitzwater's decision, but I think it gets really back to
14 what the Second Circuit said in *Brady*.

15 I mean, I have to say, I had a similar
16 conversation like this with the District Court Judge in
17 the *Brady* case, where the Court was trying to evaluate
18 the evidence and try to figure out what was fair, and
19 I -- and I gave some of the same answers.

20 And I think -- I think that, frankly, the
21 Second Circuit said, yeah, that is for the Arbitrator.

22 So I would submit, Your Honor, the
23 answer -- we don't know the answer until you have --
24 until -- until the award is issued. We're arguing about
25 what the Arbitrator might do.

1 But I would suggest that certainly what
2 he's already done, as long as -- as long -- and the law
3 is clear on this, as long as his decision is grounded in
4 the Policy. Okay. which it clearly was. He says that
5 quite clearly about what's required under Article 46.

6 THE COURT: And I understand, Mr. Nash,
7 that these procedural errors they're asserting have to
8 rise to a certain level, and that's the reason I'm
9 asking these questions of why -- and I think I started
10 by questioning, saying that I agree that generally
11 having an accuser come testify probably wouldn't be
12 necessary.

13 But the question is, is that looking at
14 the whole body of the work here, it raises questions.
15 And so --

16 MR. NASH: Well, let -- let me -- let me
17 follow up on that point with this, Your Honor.

18 And that goes to --

19 THE COURT: And, Counsel, remember, we're
20 here on injunction. So this is not whether I -- I can
21 grant summary judgment. Which, if this case stays here
22 and everything, I mean, at some point, that could be the
23 case where I have to decide it on competing summary
24 judgments.

25 We're not there yet. That's not the --

1 it's not that high of a standard for likelihood of
2 success on the merits.

3 MR. NASH: Well, that's what I was going
4 to address --

5 THE COURT: Go ahead.

6 MR. NASH: -- is likelihood of success on
7 the merits.

8 I think that Counsel did not accurately
9 state the standard. This idea that they just have to
10 raise substantial questions, this idea that they just
11 can come in and try to have confusion about who said
12 what and this might not be fair and, you know, all --
13 all these kinds of arguments, that is not the standard
14 in the Fifth Circuit. They rely on the *Terex* case for
15 that. And that's an unpublished decision, Your Honor,
16 in which, you know, the Court noted, I think at the
17 time -- this was from 2006 -- that the standard for
18 likelihood of success was not as -- not that settled.

19 Since -- it has since actually been quite
20 settled, and we -- and we point that out with a number
21 of cites. I think the *Voting for America* case that we
22 cite makes it clear that they have to make a clear
23 showing, not just raise some --

24 THE COURT: The Court is well aware of
25 what the standard is in this Court and the Fifth Circuit

1 and the Court has had a number of opportunities to issue
2 injunctions or deny injunctions. So I understand
3 what the -- what the standard is.

4 MR. NASH: Okay. I just wanted to --
5 because I just think the way Counsel described it
6 wasn't -- wasn't -- wasn't quite accurate.

7 THE COURT: I understand.

8 MR. NASH: Your Honor, I -- I -- I --
9 what -- what I -- what I want, I guess, to address in
10 the remaining time, unless you have further questions on
11 this point, is the argument that you heard at the end
12 about -- well, there are two points. One, just a point
13 of clarification.

14 He started his argument about the
15 *Del Costello* case. It is *Del Costello*, the part about
16 exhausting remedies under the LMRA. And that -- that's
17 a case where it involved whether an employee tried to
18 pursue arbitration. That's not our case.

19 Under labor law, you may know from other
20 cases, employees generally don't have the right
21 themselves to pursue a case to arbitration; it's usually
22 the Union under a Collective Bargaining Agreement that
23 gets to decide.

24 So in DelCostello what was at issue
25 there, if an employee goes to his Union and says I want

1 to grieve and the Union says no, we're not going to
2 grieve, that's exhausting the remedy. That's not what
3 we have here, where they go through the arbitration and
4 they want to, you know, look -- they don't get an award
5 and they run to court.

6 But the last point is this balance of
7 harms issue. And I guess what I want to say about that
8 is that -- and I want to present this -- I understand
9 that Mr. Elliott is a star player. I think we cite the
10 case -- the Supreme Court case, the *Brown* case that, you
11 know, football players are not different than -- than
12 other employees, they don't -- they don't get different
13 standards in these matters.

14 But in terms of the balance of harms --
15 and I think they said this themselves in the *Pennel*
16 case -- that this time -- an injunction at -- at this
17 stage would be a blatant interference with the
18 Collective Bargaining Agreement that we have.

19 And when they talk -- I thought it was
20 interesting that Mr. Kessler talked about the *Star caps*
21 case, and that's the *Williams* case, by the way, in the
22 Eighth Circuit, and he talked about how, I think the
23 District Judge, Judge Magnuson, granted him a
24 preliminary injunction.

25 what he didn't tell you -- and he's got

1 convinced by these arguments about, you know,
2 irreparable harm -- what he didn't tell you is several
3 months later, the Court granted summary judgment and
4 dismissed the case and said that the representations
5 made at the injunction hearing were not borne out by the
6 record.

7 And then that went on to the Eighth
8 Circuit. And, again, that's -- the Eighth Circuit's
9 decision in *Starcaps*, the *Williams* case, is one of the
10 consistent line of cases, the consistent line of cases
11 that under this Collective Bargaining Agreement, under
12 this article of the Collective Bargaining Agreement,
13 that says that the Courts should not interfere with the
14 disciplinary process.

15 And I would -- I would submit, Your
16 Honor, that there is absolutely a harm to -- to the NFL.
17 Because if you get to improperly use the Courts to
18 interfere with the appeals proceedings -- procedures
19 that the parties have agreed to, you get to manipulate
20 the suspension; you get to -- you get to determine
21 what -- what teams the player gets to play against.

22 There are other teams that have issues.
23 I mean, there is a very strong -- and this is a
24 fundamental, I think, interest of -- in labor law.
25 And -- and -- and I guess it's particularly obvious

1 here, I would submit. It's obvious here for the simple
2 reason that, as I said before, this is not the first
3 time we've been here.

4 This is a, frankly, an attack that the
5 Players Association has used in many of these
6 suspensions. And in every case, every case, it was
7 ultimately determined -- and we have a decision from the
8 Tenth Circuit in the *DJ Williams* case; two cases in the
9 Eighth Circuit; the *Brady* decision in the Second
10 Circuit, as I said, the *Holmes* case in the Northern
11 District of Texas, in every case, either at the District
12 Court level or ultimately, ultimately it was determined
13 that the Federal Courts are not sitting here to make the
14 kinds of decisions about who gets to play against what
15 team; or who should be suspended for how many games
16 or -- or the like. And so I would submit that --

17 THE COURT: That's not what the Court is
18 being called upon to decide.

19 The Court is -- although *Gulf Coast* is a
20 very different opinion in terms of the facts, it's
21 whether or not the arbitration proceedings were
22 fundamentally unfair. That's what the Court is being
23 asked to do.

24 MR. NASH: Well, I -- I would submit,
25 Your Honor, that that's not quite that far, only because

1 what you are currently being asked to do is interfere
2 with the enforcement of the Collective Bargaining
3 Agreement. Ultimately --

4 THE COURT: Right, but that is my
5 question -- that is a question, likelihood of success of
6 on the merits, is I do believe, under the standard of
7 likelihood of success, is it enough to at least grant
8 the injunction and then go to full briefing on the
9 summary judgment later?

10 MR. NASH: And I would submit, Your
11 Honor -- and again, I'm glad you've looked at *Brady*.

12 I think if you looked at *Peterson*, if you
13 looked at the *Holmes* decision, I think, Your Honor, this
14 is -- and if you compare it -- compare it to the cases
15 that they say is the standard --

16 THE COURT: I have read *Brady* and
17 *Peterson*, but I didn't see any of these cases having the
18 facts that are in this case. It's a different set of
19 facts.

20 And I keep coming back to it, asking you
21 to tell me why the whole Roberts situation doesn't
22 change the situation of a normal case.

23 And I know you want to minimize that; but
24 there's just a series of events that I can't necessarily
25 ignore.

1 MR. NASH: Your Honor, with respect -- I
2 would submit you're getting a very distorted view of the
3 facts.

4 And -- and this is what was argued.
5 And -- and under -- under federal labor law, the
6 determination of the facts are within the province of
7 the Arbitrator.

8 And, again, this could not be -- and the
9 Supreme Court said this, I think, in the *Garvey* case.
10 Even if the Court thinks what the Arbitrator decides on
11 the facts was wrong, if you disagree, if you might say,
12 you know what, I don't think these facts are exactly --
13 you know, I don't -- I don't agree with this, you can't
14 second-guess that.

15 So, again, I think, look, for all I know,
16 their version of the facts may carry the day with the
17 Arbitrator; but I think, respectfully, that is -- the
18 law is quite clear that it's -- that it's for him to
19 decide.

20 THE COURT: Well, I mean, the issues that
21 have been raised before this Court in the injunction and
22 in the complaint are issues he's already decided. So
23 the issue of denying the witness -- either of those
24 witnesses to testify.

25 MR. NASH: Well, I think on denying the

1 witnesses to testify, I -- I take your point. I don't
2 disagree.

3 I think I would just suggest if you look
4 at his decision, the basis for his decision, I -- I
5 think that under -- under the law, it's clear that
6 that's the kind of decision that -- it's clearly
7 grounded in the Policy. It's clearly grounded -- by the
8 way, based on his lengthy experience, and I think Mr.
9 Kessler said this in his opening statement, that he was
10 happy to have Mr. Henderson do this. He had a lot of
11 experience in these cases. Sometimes Mr. Henderson has
12 changed the discipline, sometimes he's affirmed it.

13 But based on his experience and
14 understanding of the Policy and his interpretation of
15 the Policy in the CBA, as long as he makes a judgment
16 about who gets to testify or who should testify,
17 respectfully, that really has to be, under the law, the
18 end of the matter.

19 The other arguments about, you know, Kia
20 Roberts and the like, he hasn't decided yet. This
21 argument about whether it was fair, you know, that --
22 that the evidence that she -- or the facts that she
23 based her opinions on was -- was specifically included
24 in the report, it was included in a separate memo. Her
25 concerns were communicated to the Commissioner. And --

1 and additional evidence was developed, including
2 evidence from Mr. -- Mr. Elliott that -- that cast out
3 his credibility, all of that, all of that has been
4 before the Arbitrator now.

5 And -- and so the -- I think the issue
6 that you're wrestling with is certainly an argument, I
7 think it's the primary argument, that counsel here made
8 in his closing arguments about why he didn't think that
9 the suspension was fair. And maybe the Arbitrator will
10 agree with him, maybe he won't, I don't know. We don't
11 until -- until he decides.

12 THE COURT: Thank you.

13 MR. KESSLER: Your Honor, we've been here
14 a long time, and I'm only going to be three minutes, I
15 promise.

16 First, I have news: Arbitrator Henderson
17 has issued his decision. That's why I was looking at my
18 Blackberry, for which I apologize to the Court, and he
19 has sustained the suspension, as I predicted. And as I
20 predicted, his decision is based on the notion that he
21 must defer to the fact-finding of the Commissioner.

22 And that would clearly demonstrate that
23 the Commissioner did not have the right information
24 before him.

25 We were fundamentally deprived of the

1 right to challenge the credibility, to challenge what
2 the Commissioner knew.

3 I think when you see his decision, which
4 obviously we will get to you right away, you will see
5 that precisely what the Arbitrator did is how we were
6 deprived, the burdens we faced under this policy. So
7 that's important news.

8 This is now obviously ripe. The
9 suspension will go into effect if you do not rule. And
10 so I would urge you to rule as promptly as possible.

11 Secondly, you heard from Mr. Nash talk
12 about, well, it's not misconduct.

13 well, the Fifth Circuit in the *Gulf* case
14 defined what fundamental -- fundamental unfairness was
15 and what the misconduct meant. And the misconduct is
16 not just corruption or something like that, it is
17 improperly depriving the litigant, the person in the
18 arbitration, of the evidence that's necessary to
19 adequately present your defense.

20 Your Honor's questions were right on
21 point, so I'm not going to argue anything more about
22 that.

23 Finally, with respect to *Holmes*. *Holmes*
24 was a drug policy case, it wasn't under a
25 he-said/she-said discipline policy, and it was not under

1 a credible evidence standard.

2 Your Honor's questions, again, were right
3 on point. There has never been another case like this.

4 Under these facts, under this record, I
5 believe you will find that there's been more than enough
6 here to say this may be fundamentally unfair so that you
7 should maintain the status quo, and let us fully brief
8 and present these important issues to you.

9 Unless Your Honor has any other
10 questions, I'm going to sit down.

11 THE COURT: No, I don't. Thank you.
12 Thank you, Mr. Kessler.

13 MR. KESSLER: Thank you, Your Honor.

14 THE COURT: I would ask that one or both
15 sides, someone submit that and file a supplement.

16 And then the question is, now that the
17 decision has been issued -- and especially you've had
18 the advantage over probably all of us -- everyone here
19 with a Blackberry probably also knew -- but any
20 additional briefing you want to do, I'm on a quick
21 timeline now, so the question -- if you want to file
22 anything additional, you can do by 5:00 p.m. tomorrow,
23 either side, if you want -- if you want to. You don't
24 have to. I'm not asking you to do so, I'm just giving
25 both sides the opportunity if you want to indicate how

1 the -- how the Mr. Henderson's decision impacts anything
2 with the Court.

3 With that being said, I understand I have
4 a time deadline, so I will issue a decision by probably
5 5:00 p.m. on Friday, which won't interfere --

6 Again, I'm asking again, nothing
7 interferes with his ability to play this weekend, so
8 those representations were made. So I will issue a
9 decision on how I'm going to proceed, whether I have
10 jurisdiction or ultimately the merits of the injunction.

11 Anything further from the Petitioner?

12 MR. MELSHEIMER: I would just say, Your
13 Honor, thank you. I know you've been in trial all day.
14 We really appreciate it, on behalf of the Players
15 Association and Mr. Elliott, for all the time -- the
16 two-and-half hours you devoted to this.

17 MR. KESSLER: I was just going to say the
18 same thing, I'm a guest in your Court, Your Honor, and I
19 am very grateful for the time and effort you put in at
20 the end of a long trial day. So thank you.

21 MR. GAMBRELL: Your Honor, I will just
22 say "thank you."

23 THE COURT: Okay. Well, you know, it's
24 my job. So I love my job, so that's not -- I'm just
25 doing my job.

1 Unfortunately, we have to do it so late
2 because I am in the middle of a 12-day trial, so...

3 But I will thank the parties, because if
4 the decision had come out by 4:00 p.m., I don't know
5 that my staff would have left tonight.

6 So I have until Friday so it gives me
7 more time to process all these materials.

8 So we will be -- I guess we'll adjourn
9 for the day until I resume court tomorrow at 9:00 a.m.

10 Thank y'all very much.

11 COURT SECURITY OFFICER: All rise.

12 (Proceedings concluded.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/_____

Date: 9/10/17

Judith G. Werlinger
FAPR CSR RMR CRR CMRS
TCRR TMR

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